

No. 11638

United States
Circuit Court of Appeals
For the Ninth Circuit

LOCAL 36 OF THE INTERNATIONAL FISHERMEN AND
ALLIED WORKERS OF AMERICA, JEFF KIBRE,
GILBERT ZAFRAN, CLIFFORD C. KENNISON, F. R.
SMITH, GEORGE KNOWLTON, OTIS W. SAWYER,
W. B. McCOMAS, HARRY A. McKITTRICK, ARTHUR
D. HILL, C. LLOYD MUNSON, CHARLES McLAUCH-
LAN, ROBERT M. PHELPS, BURT D. LACKYARD,
and RAY J. MORKOWSKI,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Six Volumes
VOLUME V
Pages 1903 to 2250

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

DEC 11 1947

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Mr. Dixon: May I make this an alternative suggestion, Judge?

The Court: Yes.

Mr. Dixon: Strike everything from lines—well, strike the first sentence of the paragraph that we are talking about.

The Court: The first sentence?

Mr. Dixon: Yes. "If you find as a fact that the association is a labor union, I charge you that the members of Local 36 cannot"—

Mr. Margolis: That gets away from the Clayton Act, again.

The Court: Wait a minute.

Mr. Margolis: The virtue of your Honor's instruction and the vice of this one is that one is related to the Clayton Act and the other one is not.

Mr. Dixon: We are trying here to cover what is a legitimate labor activity which we have previously referred to. I think that as long as we have described what they may do we have got to show what they may not do if they are a labor union. I am eliminating here anything about a labor union which I think—

Mr. Margolis: There may be a thousand things which they may not do as a labor union for which they could not be convicted under this indictment.

Mr. Dixon: Certainly this is the law. As "such a combination would not constitute a legitimate labor activity." And I previously said, "or combination which has as its purpose the fixing of prices as charged in paragraph 12 of the indictment," which is what they are charged with.

Mr. Margolis: Your Honor's instruction, it seems to me——

Mr. Kenny: I was going to say the government doesn't need to worry about Kibre. If he is acquitted and these working fishermen are convicted he would have to leave the union anyway.

Mr. Dixon: I think that would obviate it, Judge.

Mr. Margolis: We will be fired if we argue for Kibre.

Strike the words "a labor union cannot in the same organization".

Mr. Rubin: I think——

Mr. Dixon: In connection with what I just said, "I charge you further"——

Mr. Rubin: Yes, "cannot in the same organization combine for the purpose of fixing prices."

The Court: Then leave out "with independent business men."

Mr. Margolis: I think your Honor's statement is clear and concise and covers the situation.

Mr. Dixon: I don't think so. I think it is confusing.

The Court: Let's write it out on the typewriter.

Aren't you repeating what you said in the previous paragraph? "If you find that there is a controversy between the members of Local 36 and the fish dealers * * * such a controversy does not involve * * *"—there you say "members."

Mr. Rubin: That part, if your Honor please, has to do with a labor dispute defendant Local 36 and the fish dealers. The second situation has to do with a hybrid organization that has both employees

of anybody and employees of nobody, and if they get together and combine then it is illegal under the Allen Bradley case.

Mr. Dixon: Whether they are employees or not.

Mr. Margolis: We are getting right back to the thing that is not what is charged in the indictment, and the point is that under the Clayton Act, if we raise the defense of the Clayton Act, as your Honor has stated, we cannot——

Mr. Dixon: This is stating not the same thing that has been previously stated, because we have previously indicated the conditions, the things that they may do as a labor union, what are legitimate labor objectives under the law; we are here charging the limitation as laid down by the Supreme Court on legitimate activities of labor and I am using that term in a broad sense now, whether it is the Clayton Act or labor union, or whatever it may be called, because such a combination and activity, namely, a combination between members of an organization with independent business men,—let the [160] jury decide whether it is applicable or not.

The Court: But this was not a combination between all the members of Local 36. This is a conspiracy between Local 36 and some of its members.

Mr. Rubin: We charge that defendant Local 36, the Association, was a party to the conspiracy.

Mr. Dixon: That's right.

The Court: I know you do. But you don't charge all the members with being a party to the conspiracy.

Mr. Dixon: Only by charging the Association as a defendant.

The Court: The Association is an artificial being and acts through its officers and memberships.

Mr. Dixon: But it is an entity for the purposes of being indicted.

The Court: That is correct.

Mr. Margolis: It could be guilty without all of its members being indicted.

Mr. Dixon: It could act through its members.

Mr. Rubin: They are insisting that the members are acting together for the purpose of being a co-op.

Mr. Margolis: Whether all the members were in a conspiracy is another thing.

Mr. Rubin: We don't care to show they are all in the conspiracy. We care to show the nature of the membership, and [161] we have done so in stating that if they are partly employed and partly not employed that is an illegal combination.

Mr. Margolis: I think your Honor's instruction takes care of that.

The Court: Suppose I add another sentence here, "And it is also immaterial whether or not all of the membership of Local 36 were independent business men or were employed by some one."

Mr. Rubin: That would be material, I think, because there might be a labor dispute here.

Mr. Dixon: They have a perfect defense to this case if the jury finds there is a labor dispute.

Mr. Rubin: And there is no vertical combination, that is true.

Mr. Dixon: Under the law there isn't any question about it. And they want to go to the jury on the question of whether there is a labor dispute.

Now, we say if they want to go to the jury on this phase of the case as a defense, then, we would be entitled to show that the organization itself was composed of laborers and independent business men, and to argue that that combination, if they found such combination, would be an illegal combination in restraint of trade, provided, as we put down here. " * * * and I charge you that any defendants whom you find were engaged in such a combination would be guilty as charged in this indictment." [163]

They are protected fully, but the jury——

Mr. Kenny: How about this? "It is immaterial whether or not a defendant or any other member of Local 36"—if you inserted that wouldn't that accomplish what you want?

The Court: That may do it.

Mr. Kenny: "whether or not a defendant or any other member of Local 36 owned and operated," and so forth.

Mr. Rubin: Our position is that it is material whether they own or operate boats, because that is one of the things that makes them independent business men.

The Court: In connection with this, we are getting at. In other words, let me suggest this: that I read Section 6 of the Clayton Act, I then read that paragraph right there, and then go on with the rest of the instruction.

Mr. Kenny: That is all right.

Mr. Rubin: Wait a minute. With the rest of——

The Court: Leaving out your last paragraph. In other words, I read that directly after I read the Clayton Act.

Mr. Rubin: I think if that instruction were given that we would be entitled to an avowal by these defendants that they do not contend that there is an employer-employee relationship between the boat owners and boat pullers.

Mr. Margolis: We are not going to contend for the purposes of the Clayton Act. [163]

Mr. Rubin: What purposes would you contend it for?

Mr. Margolis: For one hundred other purposes. But this is an instruction under the Clayton Act.

Mr. Rubin: It isn't, and that is precisely why we need it in. With this instruction the defendants may argue anything before the jury. And I know your Honor is going to try to not interrupt them during this argument.

If that is your position, then I think you should be fair enough to disavow it so you cannot argue it.

Mr. Margolis: Suppose we want to say that your indictment is completely bad, regardless of the Clayton Act or anything else, because you have a complete misconception of the case?

Mr. Dixon: That has been ruled on.

Mr. Margolis: That doesn't stop us from arguing to the jury.

Mr. Rubin: Argue that to the jury?

Mr. Margolis: Yes, suppose we do want to argue that to the jury?

Mr. Dixon: Certainly we will object to that kind of argument.

Mr. Margolis: We expect a lot of objections to our argument.

Mr. Rubin: We are going to try not to object. That is why we are fighting it out today. [164]

If they are to take the position that there is no relationship I think they should state so to the court and put it in the record, because the court's statement that it is immaterial might be the basis for error if you contend it is material.

Mr. Margolis: We agree that this is a correct instruction.

The Court: In connection with the Clayton Act.

Mr. Margolis: That's right. As I understand it, this instruction deals only with the Clayton Act and nothing else.

Mr. Rubin: As to a labor dispute; now, it is certainly true, if your Honor please, regardless of the Clayton Act, and regardless of the Norris-La-Guardia Act, if there is even a labor dispute and this labor dispute has to do even with terms and conditions of employment, with wages, in fact, under the Allen Bradley case, nevertheless if there is an unholy alliance with non-labor or self-employed individuals, that is illegal. That is the law, and that is the purpose of the second portion. It has nothing to do with the first part of your contention.

Mr. Margolis: We are just going around and around.

Mr. Rubin: I don't think so. You are talking about a general exemption because you are labor,

and we are saying even if you are labor under your contention that nevertheless such a combination with non-labor is illegal. [165]

Mr. Kenny: There is no evidence here of any such combination.

Mr. Rubin: Then will you disavow that relationship?

Mr. Dixon: We want this instruction because the evidence does show non-employer relationship, and that is the theory of the indictment.

The Court: Does show——

Mr. Dixon: Non-employer relationship. This 54 per cent shows self-employed, that is the record.

The Court: Which I have said up here, that if persons are engaged in business for their own account and profit free from such controls an employer ordinarily exercises, that they are not a labor union. I have told them that.

Mr. Rubin: That is as to a labor union.

The Court: That is as to Section 6, and that is all I am dealing with.

“In connection with your consideration of this phase of the matter”——

Mr. Rubin: That is correct.

The Court: And that is all.

Mr. Rubin: That is the first part.

The Court: ——“it is immaterial whether or not a defendant or any other member of Local 36 owned and operated his own boat or fished for a share of the lay.” [166]

In other words, they are all in the same boat.

“The matter of whether or not the defendants come under Section 6 of the Clayton Act is to be determined by the relationship of the defendants to the fish dealers and not to one another,” instead of “or not to one another.”

Mr. Rubin: I would say that would be all right. Will Mr. Margolis state that is a correct statement of the law as applied to the facts in this case?

Mr. Margolis: We have no objection to this language.

The Court: Let me see. “The matter of whether or not the defendants come under Section 6 of the Clayton Act is to be determined by the relationship of the defendants”—should you add “the defendants and the members of Local 36”?

Mr. Rubin: I think that would help a great deal.

The Court: “To the fish dealers and not to one another.”

Mr. Rubin: I think that would help a lot, yes.

Mr. Dixon: I am pretty dense, Judge, but I don't see how it is going to help the jury. It is just going to tend to confuse them, rather than aid them, because the only reason that this last paragraph is applicable at all is because of the evidence in this case which is taken from the defendants' own records, which show that a great portion of the membership of this organization—and that is what determines what kind of an organization it is—at least it is one of the things [167] that helps the jury determine what they are—shows

that they are self-employed, and that a portion of them regard themselves as employed by somebody, we don't know who, maybe the canners, it may be the dealers or somebody else. On that state of the record of this association we think we should be entitled to argue that if there is that relationship, if you have a combination between independent business men—assume that the jury finds that some of them are in that category as claimed by the government, and that the others are employees of somebody, so that the jury may know what the law is as applicable to that situation in the event there is a combination found between—as charged in the indictment—I think we ought to have an instruction covering it, and I frankly feel that this one doesn't cover it.

The Court: All right. Have you got your pencils? Add this: "It is immaterial whether or not a defendant or any other member of Local 36 owned and operated his own boat or fished for a share of the lay. The matter of whether or not the defendants come under Section 6 of the Clayton Act is to be determined by the relationship of the defendants and the members of Local 36 to the fish dealers and not to one another or to any other person."

Your point is the membership shows some of them are employed. That doesn't make any difference if they are not employed by the dealers. [168]

The whole sum and substance of the defendants' position with relation to the matter of their exemption under the Clayton Act is that their rela-

tionship to the fish dealers is that of an employer and employee; their economic bargaining power, et cetera, et cetera.

Mr. Margolis: As I understand it, so we get the order of things——

The Court: Just a minute. We will write it out here.

Mr. Margolis: We have it written out. The first one will be Section 5— Section 6 of the Clayton Act will be read.

The Court: I am not sure that is the proper order. It occurred to me after I said that. I think that is the place to put it. Read Section 6 of the Clayton Act.

Mr. Margolis: That will be followed by what your Honor just dictated?

The Court: That will be followed by this, and omit the last paragraph on the page.

I will read it again:

“In connection with your consideration of this phase of the matter, it is immaterial whether or not a defendant or any other member of Local 36 owned and operated his own boat or fished for a share of the lay. The matter of whether or not the defendants come under Section 6 of the Clayton Act is to be [169] determined by the relationship of the defendants and members of Local 36 to the fish dealers and not to one another or to any other person.”

I think that clears it up.

Reading again your last paragraph at the top of the page there about a labor dispute and so forth, it has got to be a labor dispute between—in order to fit into the defendants' contention—it has to be a labor dispute between the buyers of fish and the sellers of fish.

Mr. Rubin: Would you accept the court's last statement? Would you reread that? Maybe if we can get a commitment in the record to that effect we might have something.

(The record was read by the reporter.)

Mr. Margolis: To come under the Clayton Act, yes, that's right.

The Court: That is, to come under your contention.

Mr. Margolis: With regard to the Clayton Act, that's right. Our contention with regard to the Marketing Act is something entirely different. We have different contentions that you can't tie everything into the construction. We agree to this language as applied to the Clayton Act.

Mr. Kenny: I take it your Honor's ruling on our S-8, which was left open, I suppose——

The Court: That is out.

Mr. Kenny: That is refused? [170]

The Court: That is refused.

I forgot where I was going to put this in about picketing and boycotting.

“Evidence has been admitted in the case of picketing and boycotting. These acts in and of themselves are not contrary to or in violation of any law. * * *”

Where was I going to put that?

Mr. Kenny: I don't think we decided, your Honor.

The Court: Well, it can follow this one.

Mr. Rubin: That went in the second portion of the Marketing instruction, No. 4.

The Court: It can follow this just as easily. Isn't there a break here? I think that can follow government's No.—whatever the last one was.

Mr. Margolis: Government's 5.

The Court: All right. Government's 6.

Mr. Dixon: I am sure you are not going to object to 6.

Mr. Margolis: I think we can let 6 go.

Mr. Kenny: Yes, 6 is all right.

The Court: You haven't taken me into consideration.

Mr. Margolis: Your Honor doesn't mean that he is going to overrule both of us?

The Court: Government's 6 passed.

Mr. Margolis: 7 has already been discussed, your Honor.

The Court: We are back to government's 3.

Mr. Rubin: Pardon me. I think your Honor's instruction with regard to picketing and boycotting has specific reference to our instruction No. 4 with respect to forcing contracts, and so forth.

The Court: Yes, that's right.

Mr. Rubin: I don't think it should come after 5.

The Court: Where was that? It can go in there?

Mr. Margolis: Right after 4?

The Court: Yes.

Mr. Margolis: That is all right.

Mr. Rubin: Do you have a copy of the judge's instruction?

Mr. Margolis: We have a copy, thank you.

Mr. Kenny: We object to No. 3 because it negatives the rule of reason, and since we don't have the rule of reason instruction we don't need a negative.

Mr. Rubin: There is a lot of evidence, all this stuff they put in before the jury concerning economic justification, we submit, the jury should have an instruction on.

The Court: Yes, they should. Your objection to Government's No. 3 is overruled.

Mr. Kenny: I have one suggestion. On line 9 "are not justification for illegal price-fixing combinations or conspiracies," because your Honor has otherwise qualified it in the instruction by saying "price-fixing contracts otherwise [172] illegal," so-and-so, "unlawful combination," and so forth.

Mr. Rubin: You can say "for such price-fixing combination."

Mr. Kenny: "Illegal" would spell it out.

The Court: I think so.

Mr. Margolis: We do want to, however, state——

Mr. Kenny: Let's see if we have that.

The Court: "* * * for illegal price-fixing combinations or conspiracies * * *."

Mr. Margolis: We want to state our objections a little more fully. I think Judge Kenny merely stated it on the ground that we didn't have the rule of reason.

It is our contention that the rule of reason does apply to this sort of a situation, and our previous argument with regard to the Socony Vacuum Oil Company case applying to consumer prices and situations, which we have previously defined, and not to the situation here, is hereby incorporated by reference in our objections.

Mr. Kenny: Then there is just one other thing. I think the last sentence is, in addition to being repetitive——

The Court: Argumentative, I think.

Mr. Rubin: What is that?

The Court: The last sentence. I have told the jury that the reason for the law is none of their concern.

Mr. Dixon: All right. Take it out. [173]

The Court: On the next instruction there should be an addition.

Mr. Rubin: Which one is that, your Honor?

The Court: That is now No. 15, government's. This is the last one.

In the first line strike out "excuse or," and there should be added after the word "indictment" something to this general effect. Let me glance at it again.

"You are instructed it is no defense to those on trial that others not on trial, or not indicted, appear from the evidence to be implicated in the conspiracy alleged in the indictment, or to be themselves guilty of some other illegal combination or conspiracy."

Mr. Rubin: That is correct.

Mr. Margolis: How was that again?

The Court: Add after the word "indictment" "or to be themselves guilty of some other illegal combination or conspiracy."

In other words, it is no defense to these defendants that the fish dealers might be guilty of a conspiracy.

Mr. Margolis: I am just wondering about the order here. The way the government has 3, 4 and 5 following each other seems to me is the logical way of having these.

The Court: Well, I don't think so. I thought 3 more [174] nearly came in at the end of the business.

Mr. Margolis: The point is that it is a question of—those three deal with defenses; one of them says, "This defense doesn't apply," and the really important ones from the standpoint of the jury to consider are 4 and 5, where they might have something to consider. 3 is something to throw out of your mind.

The Court: I give them 4 and 5, and then I give them 3. In other words, in reading 4 and 5 their process of thought might come to 3, that is the reason I put it after 5, because that was the way it arranged itself in my mind, and being a very ordinary person it occurred to me that a jury of a cross section of the community would think of it the same way.

Mr. Dixon: In other words, No. 3 is to follow 4 and 5?

The Court: Yes.

Mr. Margolis: We feel it should precede them.

Mr. Kenny: We agree with the government on its order.

What about 16 and 17?

Mr. Margolis: I wonder, for the purpose of the record——

The Court: Let me recapitulate on these instructions so that you can make your record on it.

The instructions offered by the defendants——

Mr. Margolis: Is your Honor going to give them in the order they will be given?

The Court: The following instructions offered by the [175] defendants are refused: Defendants' instructions 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, S1, S-2, S-3, S-4, S-5, S-6, S-8, S-7, S-9, S-10, S-12, S-13, S-14, S-16, S-17, and S-18.

Mr. Margolis: May we at this time——

The Court: Wait a minute. ——on the grounds that have been heretofore indicated in the discussion.

Mr. Margolis: May we state, your Honor, at this time that we object to the refusal of the court to give each of these instructions and each and every part of each of these instructions on the grounds that the instructions correctly state the law applicable to the facts of this case, and that they are not otherwise adequately covered in the court's instructions.

The Court: All right. And the objections are overruled as I have indicated.

The government's proffered instructions G-9, G-11, G-12, G-13, and G-14 are refused for the reasons given.

Mr. Margolis: I didn't get that.

The Court: 9, 11, 12, 13 and 14 are refused for the reasons heretofore indicated.

Mr. Rubin: We will not object, if your Honor please, because our objections will avail us nothing.

The Court: I will cover it this way: Except for the general instructions which I indicated heretofore will take [176] No. 1, the following instructions will be given: —

Mr. Kenny: That will be Court's 1.

Mr. Margolis: What are the pages of the transcript, your Honor?

The Court: Beginning at page 48 to page 61 of the transcript. And the others which I indicated would be given. There were two others following it. Do you remember I read them to you? The failure of a defendant to take the stand, and a government officer having no special significance.

Mr. Dixon: Can we get copies of them?

The Court: There are only two very short ones.

The court's instruction No. 1 with the additions that I indicated in the early part of the session this morning will be followed by Government's Instruction No. 10, Court's Instruction No. 2, Government's Instruction No. 7 as modified, Government's Instruction No. 16, Government's Instruction No. 17, Government's Instruction No. 8, Defendants' Instruction No. 1, Defendants' Instruction No. 20, Defendants' Instruction No. S-15 as modified, Sup-

plemental 15, Government's Instruction No. 1 as modified, Government's Instruction No. 2 as modified, Defendants' Instruction No. S-11 as modified, Government's Instruction No. 4 as modified, another instruction which we will call Court's No. 3, that is about picketing.

Mr. Margolis: Court's 3 is picketing?

The Court: Yes, Court's 3 is picketing, following Government's Instruction No. 4, followed by Section 6 of the [177] Clayton Act, Court's No. 4, that is the one we wrangled about so much, Government's Instruction No. 5 as modified, Government's Instruction No. 6, Government's 3 as modified, Government's 15 as modified, to then be followed by the general concluding instruction which I read to you earlier this afternoon, beginning, "There is nothing peculiarly different in the way a jury should decide a case," and so forth.

Mr. Dixon: Judge, I think we overlooked, or maybe I missed it, the Marketing Act, Fisheries Marketing Act.

Mr. Kenny: That is Defendants' 11 as modified.

Mr. Margolis: If your Honor please, at this time we would like to object to each—to the modification of Defendants' Instructions on the grounds previously stated in argument, without repeating them, and we would like to object to the Government's Instructions which were given, and each and every portion of the Government's Instructions, on the grounds previously stated in argument and discussion of the individual instruction.

The Court: All right. Objections are overruled.

Los Angeles, May 7, 1947

4:25 o'Clock P.M.

(After recess.)

The Court: Usual stipulation?

Mr. Margolis: Yes, your Honor.

Mr. Dixon: Yes, your Honor.

The Court: Mr. Clerk, you have submitted the proposed form of verdict to counsel?

The Clerk: Yes, I have.

The Court: Any objection to it?

Mr. Margolis: No, your Honor.

Mr. Dixon: No, your Honor.

The Court: I propose to send to the jury at the conclusion a copy of the indictment, and I wondered if there was any objection if I sent this printed copy to them.

Mr. Margolis: No objection.

The Court: It has no markings of any kind on it.

Mr. Dixon: No objection.

The Court: And the exhibits which are admitted in toto but not those that are admitted piece by piece.

Mr. Margolis: Yes, your Honor.

The Court: Very well.

INSTRUCTIONS TO THE JURY

The Court: Ladies and gentlemen of the jury, at the outset of the trial I read you some general instructions concerning the method and manner and the rules for weighing evidence, and told you at that time that I would repeat them at the conclusion of the case. I did so with the consent of

counsel for both sides and in the hope that most of you who are strange to these proceedings might find some aid in weighing the evidence as it came in and giving you a determination as to the method of applying that method when the responsibility finally devolved upon you to respond with a verdict to the indictment in this case.

Now it is my time to instruct you on the law. The case has been rather long in trying. I hope it has not discommoded you too much, but you accepted your responsibility as citizens and now there will shortly devolve upon you the gravity of giving a verdict of guilty or not guilty as to these defendants.

It is your duty as jurors to follow the law as I shall state it to you and, on the other hand, it is your exclusive province to determine the facts in the case and to consider and weigh the evidence for that purpose. That authority vested in you is not an arbitrary power but must be exercised with sincere judgment, sound discretion and in accordance with the rules of law which I shall state to you in these instructions.

If in these instructions which I am about to read to you now, any direction or rule or idea is stated to you in varying ways, or a subject matter in the instructions is treated first or last or if it might be repeated, no emphasis is intended to be placed on that instruction and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or individual instruction and ignore all the others, but

you have to consider all the instructions together and as a whole, and to regard each in the light of all the others.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly without an inference or a presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue but which affords an inference or a presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts, and unless declared by law to be conclusive—and there are no conclusive presumptions in this case—a presumption may be controverted by other evidence, either direct or indirect, but unless so controverted the jury is bound to find according to that presumption.

An inference, on the other hand, is a deduction which the reason of the jury directs shall be drawn from the facts which are proved. An inference must be founded on a fact or facts proved and be such a deduction from those facts as is warranted by consideration of the usual propensities or passions of men, the particular propensities or passions of the persons whose conduct or acts are in question, or the course of business or the course of nature.

And the word "propensity" as used in these instructions means any natural or habitual inclination or tendency.

You are not bound to decide any fact or the main issue in conformity with the testimony or the number of witnesses which does not produce conviction in your mind as against the declarations of a lesser number of witnesses, or as against a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of a greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does not mean that you are to decide an issue by the simple process of counting the number of witnesses who have testified, but it does mean that the final test is not in the relative number of witnesses but in the relative convincing force of the evidence.

The testimony of one witness entitled to full credit is sufficient for the proof of any fact in accordance with such testimony even if a number of witnesses have testified to the contrary, if from the whole case, considering the credibility of the witnesses, and after weighing the various other factors in the evidence, the jury believes the one witness.

In weighing the testimony of witnesses it is proper for you to consider those factors of human nature which, either with or without any wrongful intention, may obstruct the giving of perfectly true testimony. Those factors are suggested by these

questions: Did the witnesses have a full opportunity to learn the truth? If so, did the witness have the intelligence and purpose to ascertain the facts? What was the advantage or disadvantage from the point of observation? Does the evidence show that the witness had a motive for favoring or an inclination to favor any party? Was he or she, in other words, a biased or an impartial witness? What degree of intelligence, what quality of memory, and what grade of moral purpose, so far as concerns this case, were revealed by the witness' appearance, manner of testifying, and all the other evidence in the case? Is there any timidity or physical handicap, lack of ability in self-expression, or other conditions that place a witness at a disadvantage or might cause his or her testimony to appear on the surface as being less trustworthy than it really was? Was the witness, without fault of his own, confused or embarrassed and thus placed in a light not truly representative?

Should you consider any of these questions, either in your own private reasoning or in open discussion after the case is finally submitted to you, you must look for an answer only to the evidence admitted in the trial of this case.

Any evidence that has been received of an act, omission or declaration of a party which is unfavorable to his own interest should be considered and weighed by you like any other admitted evidence, but evidence of the oral admission of a party other than his own testimony in this trial ought to be viewed by you with caution.

From time to time counsel for one or the other of the parties in the case has interposed objections to questions or to the admission of evidence. Counsel not only have the right, but they have a duty, to make any and all objections which are deemed advisable or appropriate by them, and no inference or presumption can or should be indulged in one way or the other by reason of the interposition of any objection on behalf of any counsel.

At times throughout the trial the Court has been called upon to pass upon the question whether or not certain offered evidence might or might not be properly admitted. You are not to be concerned with the reasons for any rulings which might have been made, nor to draw any inference from those rulings. Whether offered evidence is admissible or not is purely a question of law. In admitting evidence to which an objection might have been made, the Court does not determine what weight should be given to that evidence, nor does it pass on the credibility of the witnesses. As to any offer of evidence that might be rejected by the Court, of course you must not consider that evidence. As to any question to which an objection might have been sustained, you must not conjecture as to what the answer might have been or the reason for the objection.

The law does not require the defendants to prove their innocence which, in many cases, might be impossible, but the contrary the law requires the prosecution to establish beyond a reasonable doubt and by legal evidence the guilt of any person

charged. And if the Government fails to so prove, you should find the accused persons not guilty.

You must not allow yourselves to be led to convict the accused in this case in order to satisfy a fear that some offense may go unavenged or unpunished, or for the purpose of deterring others from the commission of like offenses. No such argument or reason can be weighty enough to justify you in laying aside that just and humane rule of law which requires you to acquit an accused person unless every fact necessary to establish his guilt is proved to you beyond a reasonable doubt and to a moral certainty.

The rule concerning circumstantial evidence does not permit you as jurors to indulge in speculation or surmise, conjecture or guesswork, in order to supply any element of any offense alleged by a prosecuting witness or charged by the Government in this case to have taken place where proof of such element does not appear beyond a reasonable doubt and to a moral certainty. Speculation, surmise, conjecture or guesswork can never be substituted in lieu of proof to justify conviction of an accused person.

Suspicion is not evidence. Mere suspicion, however strong, is not sufficient to establish any fact whatsoever necessary to constitute the crime charged. Mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of evidence support the allegations of the indictment. Nor is it sufficient that upon the doctrine of chance it is

more probable that the accused might be guilty than innocent. The accused persons must be proven guilty so clearly that there is no reasonable theory upon which they can be said to be innocent, or he, individually, when all of the evidence is considered together. Mere opportunity of an accused person to commit a crime charged is insufficient to justify a verdict. In every criminal case the proof must substantially correspondent to the material allegations of the indictment which has been read to you.

By the arrest of the defendants or by the return of the indictment, no presumption whatsoever arises to indicate that a defendant is guilty or that he had any connection with or responsibility for the acts charged against him. A defendant is presumed to be innocent at all stages of the proceeding until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt. And this rule applies to every material element of the offense charged. There is only one offense charged here, a conspiracy. Mere suspicion, as I have indicated, will not authorize a conviction, and a reasonable doubt is such as you may have in your minds when, after fairly and impartially considering all the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt.

In order that the evidence submitted shall afford proof beyond a reasonable doubt, it must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs. Reasonable doubt is not a mere possible or imaginary doubt, nor is it a bare conjecture, for

it is difficult to prove anything to an absolute certainty. You are to consider the strong probabilities of the case, and a conviction is justified only when such probabilities exclude all reasonable doubt, as the same has been defined to you.

Without it being restated or repeated, either now in this part of the instructions or subsequently, you are to understand that the requirement that a defendant's guilt be shown to be beyond a reasonable doubt is to be considered with and accompanying each and every instruction.

In judging of the evidence you are to give it a reasonable and a fair construction, and you are not authorized, as I have indicated, because of any feeling of sympathy or bias to apply a strained construction, one that is unreasonable, in order to justify a certain verdict or conclusion when, were it not for such feeling or bias, you would reach a contrary conclusion. And whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is reasonable doubt in your minds as to whether or not the evidence is so balanced, the conclusion of innocence upon such occasion must be adopted.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have been called to testify in this trial and of the documentary evidence which has been introduced. A witness is presumed to speak the truth. This presumption, however, may be repelled

by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty and integrity, or by his motives, or by contradictory evidence. In judging the credibility of the witnesses who have been called, you may believe the whole or any part of the evidence of any witness, or you may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men and women.

You should carefully scrutinize the testimony given, and in so doing consider all the circumstances under which the witness testified, his demeanor while on the stand, his intelligence and the other things which I have outlined to you, as well as the relationship which the witness might bear to the Government or to any of the defendants, the manner in which a witness might be affected by the verdict, and the extent to which a witness might be contradicted or corroborated by other evidence, if at all, and every matter which tends reasonably to shed light upon his testimony and his credibility.

If a witness is shown knowingly to have testified falsely on a trial touching any material matter you should distrust his testimony in other particulars, and in that case you are at liberty to disregard and reject the whole of that witness' testimony.

All but one of the defendants have offered themselves as witnesses in this case. As to the one defendant who did not testify, you are not to draw any inference or presumption concerning the fact that he did not take the stand. As to those who did take

the stand, you are to estimate and determine the credibility of the defendant as a witness in the same manner that you would consider the testimony of any other witness, and it is proper to consider all the matters that have been suggested to you in that connection, including the interest which the defendant has in his own case, his own hopes and his fears, and what he might have to gain or lose as a result of your verdict.

You are not limited in your consideration of the evidence to the bald expression of any witness. You are authorized, as I have indicated, to draw such inferences as I have defined an inference from the facts and circumstances which might be proved, as seem justified in the light of your experience as reasonable men and women.

The mere fact that a witness might have been connected with the United States Government in any capacity whatsoever does not mean that the testimony of such witness is entitled to any greater weight or credence by that fact alone. You will consider the testimony of any officer or employee of the United States Government the same as you would consider the testimony of such person if he were not so employed.

The indictment in this case, as in every indictment in every case, is merely the method provided by the law whereby the United States, through a grand jury and on behalf of the people, shall charge one or more parties with a violation of the law, and whereby the party or parties accused shall be advised of the charge or charges so that such party or parties may defend against such charge.

As I have indicated, the mere fact that an indictment has been returned gives rise to no inference that the accused are guilty. The establishment of guilt is a matter of proof.

The law under which these proceedings are brought is commonly called the Sherman Antitrust Act. The pertinent provisions of that law are as follows (reading from Section 1, Title 15, U. S. Code):

“Every combination or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal; * * * Every person who shall engage in any combination or conspiracy declared to be illegal shall be deemed guilty of a misdemeanor * * *”

The law provides an appropriate punishment, but you are not to be concerned with the punishment or to take it into consideration at all in your deliberations as that is a matter which is the exclusive responsibility of the judge in the event of a conviction.

You are not to be concerned with the reason for the law, or whether you regard it as a good or bad law. It was passed by that branch of the Government charged with the responsibility of making laws. It is constitutional and is the law of the land, and you must accept it as such.

The indictment, which was outlined at length at the beginning of the trial by Government counsel, and also in later argument, charges, in brief, that

some time prior to May 1946 the defendants charged in a combination and conspiracy in Southern California to "fix, establish and maintain arbitrary, artificial and non-competitive prices for the sale to dealers of fresh fish and crustaceans caught in the waters of the Pacific Ocean, both territorial and foreign off the coast of California, from Morro Bay south to and including the territorial waters off the west coast of Mexico, and to prevent dealers who did not agree to pay said prices from obtaining, selling or shipping any fresh fish or crustaceans, all in violation of the above-entitled Sherman Act." The indictment of course goes into much more detail, but the foregoing is the essence of the charge to which you must respond with a verdict of either guilty or not guilty as to these defendants. You may have the indictment in the jury room if you wish so that you may see all of its terms.

The indictment thus charges the defendants with having engaged in a conspiracy in restraint of trade, in violation of the Sherman Act. A conspiracy may, in general, be defined as a combination or agreement among two or more persons to accomplish an unlawful purpose or act, or to perform a lawful act by unlawful means. To establish such a conspiracy, it is sufficient if two or more persons in any manner or through any contrivance expressly or tacitly, whether orally or in writing, and whether openly or secretly, come to a mutual understanding to accomplish a common and unlawful purpose.

The law does not require the Government to put its finger on the precise manner or method in which

a combination or conspiracy or an unlawful agreement contrary to the Sherman Act was knowingly entered into because in many cases it would be impossible for the Government to produce such proof in detail.

One who participates in a conspiracy and with knowledge of the conspiracy is guilty, even though he is absent when the criminal or unlawful act which is the object of the conspiracy is committed. His knowledge of the scope of the conspiracy may be limited and he need not know all the details of the plan or all of the operation of the conspiracy to be guilty.

A person who joins an existing conspiracy is liable for all the acts of the conspirators committed before he joined the conspiracy if he joined with knowledge of the conspiracy. Such a person is also bound by the acts of the other co-conspirators after he joins the conspiracy. His joining the conspiracy does not create a new conspiracy, and does not change the status of the other conspirators. The new member is as guilty as though he had been an original conspirator.

The success or failure of a combination or conspiracy is immaterial as the crime under the Sherman Act is the act of conspiring itself, and no overt act in furtherance of the conspiracy need be proved.

It is only necessary that the Government prove that the conspiracy charged in the indictment existed some time during the period of three years before the date of the return of the indictment, or, in this case, at any time within three years prior to August

23, 1946. The guilt of any defendant who you may find participated in such a conspiracy was fixed beyond repentance once you find there was a conspiracy and that such defendant or defendants participated therein. A withdrawal from the conspiracy by a defendant, or the subsequent dissolution or abandonment of the conspiracy, if you find that there was a dissolution or abandonment thereof, would not relieve from criminal responsibility any defendant who you may find participated in the conspiracy charged in the indictment at any time during said 3-year period.

It is sufficient if there is a concert of action, all of the parties working together understandingly, with a single design and for the accomplishment of a common purpose. It is not necessary that each conspirator have knowledge of all the details of the conspiracy, or the means to be used; nor is it necessary that the conspirators should meet together, in order to constitute an unlawful combination. If they have a mutual understanding, and act through one or more individuals as a consequence of such mutual understanding, the conspiracy is complete.

It is not necessary that the Government prove each and every allegation of the indictment, or that the Government prove that the defendants sought to attain every object alleged in the indictment to have been part of the conspiracy. Nor is it necessary that the Government prove that the defendants performed each and every act alleged in the indictment by which the conspiracy is alleged to have been

effectuated. If the Government proves beyond a reasonable doubt that the defendants or any two or more of them combined and conspired to restrain interstate or foreign trade and commerce in fresh fish, as alleged in paragraph 12 of the indictment (which was the paragraph I paraphrased to you a while ago), any defendants who you may find were members of or participants in such a conspiracy would be guilty as charged in the indictment.

In this case the defendants are accused of entering into an unlawful combination and conspiracy. The word "conspiracy" is not to be understood by you as meaning anything more than an alleged "combination" as alleged in the indictment. I mention this so that you will not attach any undue meaning to the word "conspiracy" and, further, that it is only intended to mean that the defendants are accused of agreeing among themselves to do the things set forth in the indictment.

Under our laws, each of the defendants is presumed to be innocent of any crime, and particularly the alleged crime set forth in the indictment which has been read to you. This indictment is not evidence of the commission of any wrong or crime, nor is it intended to convey to you that the defendants have committed any wrong or crime; it is simply the method used in bringing people to trial when they are accused of crime.

This presumption of innocence also applies to each defendant, independent of the other defendants, which means that the presumption of innocence applies equally to each of them.

In this case the defendants are not required to prove their innocence. The Government has the complete burden of proving each defendant, independent of the other defendants, guilty beyond a reasonable doubt. Therefore every material allegation of the indictment must be proved to your satisfaction, beyond a reasonable doubt as to each defendant, before you would be justified in finding that particular defendant guilty.

In considering the evidence in this case as to each defendant, if you are unable to reach a point in your minds which convinces you beyond all reasonable doubt and to a moral certainty that a particular defendant, or all defendants, are guilty, then it is your duty to find such defendant or defendants not guilty.

Any alleged or proved restraint by one or more of the defendants with the business of any so-called individual fish dealer or dealers mentioned in this case is not the controlling factor to be considered by you in arriving at your verdict in this case. The Government must prove a conspiracy to restrain in a substantial way the charge made in the indictment.

The term "fishermen" as used in the indictment refers to an individual or group of individuals who own, lease or operate a particular boat for the purpose of engaging, on their own account, in the business of catching fresh fish and crustaceans in the fishing area defined in the indictment and bringing them to fishing ports for the purpose of sale to dealers. Paragraph 11 of the indictment alleges

that fishermen who are members of the defendant Local 36, IFAWA, are not employees, workers or laborers who receive a salary or wage for their work or labor, but are independent businessmen engaged in business on their own account and who operate fishing boats for their own account and profit.

The indictment further alleges that no employer-employee relationship exists between the fishermen members of the defendant Local 36 and the dealers to whom their catch is sold, and that the fishermen members of the defendant Local 36 sell their catch directly to dealers and do not act collectively through the defendant Local 36 in catching, producing, preparing for market, processing and handling their catch.

If you find as a fact that the fishermen members of defendant Local 36 are independent businessmen who are engaged in the business of catching and selling fish to dealers on and for their own account and profit, and that they sell their catch directly to buyers, then I charge you as a matter of law that a conspiracy or combination as alleged in the indictment of any such fishermen for the purpose of fixing, establishing and maintaining the price at which they shall individually sell their fish, and to prevent the buyers of fish who refuse to pay the price so agreed upon among the fishermen members of defendant Local 36 from obtaining fish from sources other than the members of defendant Association constitutes a violation of the law, and that any and all individual defendants herein who you find have been members of or participated in such

combination or conspiracy for the aforesaid purposes would be in violation of law as charged in the indictment.

If you find that the fishermen members of defendant association are in fact businessmen as charged in the indictment and that the defendants have in fact combined and conspired among themselves to fix the price at which the individual members sell their fish to the dealers, then it is immaterial whether the price so fixed by agreement among the defendants is reasonable or unreasonable.

Price-fixing includes more than the mere establishment of uniform prices. Prices are fixed within the meaning of these instructions if the prices to be charged by the individual fishermen members of defendant Local 36 are to be at a certain level; or on ascending or descending scales, or if they are to be uniform, or if by various formulae they are to be stabilized. Price-fixing also includes placing a floor under the market, a floor which may serve the function of increasing the stability and firmness of market prices, and which may prevent the determination of those prices by free competition alone.

The Fish Marketing Act, which has been referred to during the trial of this case, reads in its material portions as follows:

“Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise,

with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.

“The term ‘aquatic products’ includes all commercial products of aquatic life in both fresh and salt water, as carried on in the several states, the District of Columbia, the several Territories of the United States, the insular possessions, or other places under the jurisdiction of the United States.

“Such associations may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purpose: Provided, however, That such associations are operated for the mutual benefit of the members thereof, and conform to one or both of the following requirements:

“First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; or

“Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

“and in any case to the following:

“Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.”

As a matter of law, persons engaged in the business of catching fish for sale and profit may act together in an association in collectively catching, producing, preparing for market, processing, handling and marketing of the fish caught by their members. When formed for such purposes, such an association may, on behalf of its members, enter into a contract with a buyer of fish which provides for and fixes the price at which the association itself or as sales agent for its members sells on behalf of its members the fish caught or to be caught by the members of the association to a buyer. Such contracts must, however, be arrived at by free and voluntary negotiations between the parties thereto. I charge you that if you find as a fact that the defendant association is the type of association before described, any such contracts must be separately and voluntarily entered into and negotiated by and between the association and the buyers of fish, and that neither said association nor its members can force any buyer of fish to enter into such a contract by practices and tactics which are not free and voluntary. Such a contract entered into between the defendant association and a buyer or buyers of fish under the latter circumstances would be one in which the price was fixed by one party to the contract and the price would therefore be arbitrary, artificial and non-competitive, and such a contract would be illegal and in restraint of trade.

Evidence has been admitted in the case of picketing and boycotting. These acts in and of themselves are not contrary to or in violation of any law. They

are to be considered by you as evidence in your determination as to whether the defendants did or did not combine or conspire as alleged in the indictment. If you find that the defendants did not so combine or conspire, then you should acquit the defendants.

Section 6 of the Clayton Act was read to you by one of counsel. I will read it again.

“The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”

In connection with this phase of the matter, it is immaterial whether or not a defendant or any other member of Local 36 owned and operated his own boat or fished for a share of the lay. The matter of whether or not the defendants come under Section 6 of the Clayton Act is to be determined by the relationship of the defendants and members of Local 36 to the fish dealers and not to one another or to any other person.

Further in that connection the indictment charges that the defendant association Local 36, IFAWA, is in fact an association of independent businessmen engaged in the business of catching and selling fish for their own account and profit and that the members of Local 36 are not employees of the fish dealers. The fact that said defendant association may refer to, act as, or call itself a labor union does not in and of itself make said association a labor union. An association of independent producers or of persons who are self-employed and who are engaged in business on and for their own account and profit, free from such controls as an employer ordinarily exercises over a person who is an employee, would not be a labor union.

If you find as a fact that the membership of defendant Local 36, IFAWA, consists of persons who stand in the relationship of employees to the fish dealers, I charge you that the members of said association may join together and carry on acts to effect changes in the terms and conditions of their employment, even though their acts may affect or obstruct interstate or foreign commerce and that in doing so they would be pursuing a legitimate objective. They may, however, perform acts which affect or obstruct interstate or foreign commerce as a matter of law only if there is a labor dispute between the members of Local 36 and the parties against whom their acts are directed or intended to affect, in this case the fish dealers. Such a labor dispute, however, must affect the terms and conditions of employment of the members of Local 36 or the terms and conditions of their employment must

be the matrix of any controversy or dispute you may find as a fact existed between the members of defendant association and the fish dealers.

If you find that there is a controversy between the members of Local 36 and the fish dealers and that controversy is solely one over the price or terms and conditions at which the members of Local 36 shall sell their fish, and that such a controversy does not involve or affect an employer-employee relationship or is not the matrix of the controversy, then no labor dispute can be said to exist between the member of Local 36 and the fish dealers which would entitle the members of Local 36 to combine together to restrain foreign and interstate trade and commerce in fresh fish as charged in the indictment, under Section 6 of the Clayton Act.

An officer of an unincorporated association is not authorized merely by virtue of his office to make the association a party to an unlawful conspiracy. In order to bind the defendant association by the act of a representative or officer thereof, it is necessary for you to find that the defendant association authorized or ratified the act. You are accordingly instructed as a matter of law that the defendant association cannot be found guilty in this case for an unlawful act or acts, if any, of individual officers, members, or agents unless you find such clear proof from the evidence that the defendant association actually participated in or actually authorized such unlawful act or acts, if any, or ratified such act or acts, if any, after actual knowledge thereof.

No individual defendant who is an officer or member of the defendant association can be found guilty for an unlawful act or acts, if any, of other officers, members, or agents of such association except upon clear proof from the evidence that such individual defendant actually participated in or actually authorized such an act or acts or ratified such unlawful act or acts, if any, after actual knowledge thereof.

You are instructed that the elimination of so-called "competitive evils" in an industry is not a legal justification for price-fixing contracts otherwise illegal. Ruinous competition, financial disaster, and evils of price-cutting are not available to justify the action or conduct of persons engaged in an unlawful combination to fix and determine in an arbitrary manner prices of commodities sold in an interstate market. Genuine or fancied competitive abuses are no legal justification for illegal price-fixing combinations or conspiracies, and the good intentions of the members of any such illegal combination are likewise immaterial.

You are instructed that it is no defense to those on trial that others not on trial, or not indicted, appear from the evidence to be implicated in the conspiracy alleged in the indictment, or to be themselves guilty of some other illegal combination or conspiracy. You are to consider the guilt or innocence of those on trial without regard to the culpability of others who are not on trial.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any

question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purpose only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict. For to the jury exclusively belongs the duty of determining the facts.

You are instructed that if the judge has said or done anything throughout the trial or in these instructions which has suggested to you that he is inclined to favor the claims or position of either party, you will not suffer yourselves to be influenced by any such suggestion. I have not expressed, nor intended to express, nor have I intimated or intended to intimate, any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established, or what inferences should be drawn or should not be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you now to disregard it.

You should not consider as evidence any statement of counsel made during the trial or argument unless such statement was made as an admission or stipulation conceding the existence of a fact or facts. You must not consider for any purpose any evidence offered and rejected, or which has been

stricken out by the Court. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been admitted by the Court and the inferences that you may reasonably draw therefrom and such presumptions as the law may deduce therefrom, as given in these instructions.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. To each of you I would say that you must decide the case for yourself, but you do so only after a consideration of the case with your fellow-jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, none of you should vote either way, nor be influenced in so voting, for the single reason that a majority of the jurors are in favor of such party. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

Remember that you are not partisans or advocates in this matter, now you are judges. The final test of the quality of your service will lie in the verdict which you return to this courtroom and not in the opinions which any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case, and to that end the Court would remind you that

in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

After the bailiffs have been sworn you will retire to the jury room. The indictment and the exhibits I have heretofore indicated will be sent to the jury room by the bailiff for you to examine if you desire. When you have agreed upon a verdict you will fill in the verdict accordingly, indicating your conclusion as to the various defendants, and the foreman will sign the verdict. You will elect a foreman as soon as you retire to the jury room. Upon reaching a unanimous conclusion as to each of the defendants as to whether they are guilty or not guilty, each of you will return to your places in the courtroom.

The Clerk will swear the bailiffs.

(Whereupon the clerk swore the bailiffs to take charge of the jury.)

The Court: Mr Hunter is excused. You may step down. You are permanently excused.

The Clerk will hand the bailiff the exhibits and the indictment. The parties have heretofore indicated their objections to the instructions which have been noted of record. You may retire.

(The jury retired from the courtroom at 5:30 o'clock p.m.)

* * *

(The jury returned to the courtroom at 9:45 o'clock p.m.)

The Bailiff: Ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: We have, your Honor.

The Court: The foreman will hand the verdict to the bailiff.

The Clerk will read the verdict.

The Clerk: "United States of America, Plaintiff v. Local 36 of International Fishermen & Allied Workers of America, Jeff Kibre, Gilbert Zafran, Clifford C. Kennison, F. R. Smith, George Knowlton, Otis W. Sawyer, W. B. McComas, Harry A. McKittrick, Arthur D. Hill, C. Lloyd Munson, Charles McLauchlan, Robert M. Phelps, Burt D. Lackyard and Ray J. Morkowski, Defendants; No. 18842, Criminal. Verdict.

"We, the jury in the above-entitled case, find the defendant, Local 36 of International Fishermen & Allied Workers of America, guilty as charged in the indictment;

"find the defendant Jeff Kibre guilty as charged in the indictment;

"find the defendant Gilbert Zafran guilty as charged in the indictment;

"find the defendant Clifford C. Kennison guilty as charged in the indictment;

"find the defendant F. R. Smith guilty as charged in the indictment;

"find the defendant George Knowlton guilty as charged in the indictment;

“find the defendant Otis W. Sawyer guilty as charged in the indictment;

“find the defendant W. B. McComas guilty as charged in the indictment;

“find the defendant Harry A. McKittrick guilty as charged in the indictment;

“find the defendant Arthur D. Hill guilty as charged in the indictment;

“find the defendant C. Lloyd Munson guilty as charged in the indictment;

“find the defendant Charles McLauchlan guilty as charged in the indictment;

“find the defendant Robert M. Phelps guilty as charged in the indictment;

“find the defendant Burt D. Lackyard guilty as charged in the indictment;

“and find the defendant Ray J. Morkowski guilty as charged in the indictment;”

The Court: The Clerk will poll the jury. Do you wish each polled as to each defendant or will one polling be sufficient?

Mr. Margolis: One will be sufficient.

The Court: As your name is called, you will answer yes or no whether or not the verdict as read by the Clerk is your verdict.

The Clerk: Clayton Preston Strain?

Juror Strain: Yes.

The Clerk: Anne Irma Pettit?

Juror Pettit: Yes.

The Clerk: Agnes Brown?

Juror Brown: Yes.

The Clerk: Royal Edward Secord?

Juror Secord: Yes.

The Clerk: George Tadashi Shimizu?

Juror Shimizu: Yes.

The Clerk: Harold Sheldon Kinney?

Juror Kinney: Yes.

The Clerk: Glen Moore?

Juror Moore: Yes.

The Clerk: Frank Edward Miller?

Juror Miller: Yes.

The Clerk: Arthur Lincoln Line?

Juror Line: Yes.

The Clerk: Julia Firestone Whyte?

Juror Whyte: Yes.

The Clerk: Arthur Sherman Patrick?

Juror Patrick: Yes.

The Clerk: James Wark?

Juror Wark: Yes.

The Court: Very well. The clerk will record the verdict.

Ladies and gentlemen, that concludes your services in this matter. I am sure everyone in the courtroom expresses to you a debt of gratitude for the time that you have spent, whether they agree with your verdict or not. I think you may be excused until further notice. It is my intention to suggest to the senior judge that you be excused for the remainder of the term because you have now spent I think something like 24 days of actual trial work on this trial stretched over a period of almost eight weeks.

(The jury retired from the courtroom at 9:50 o'clock p.m.)

The Court: By the way, may the record show that all the defendants were present in person except the defendant Otis Sawyer, who was excused by the Court during the recess.

Mr. Margolis: I think that is correct, your Honor.

The Court: Very well. On the matter of sentence, what is your pleasure in that respect?

Mr. Margolis: If your Honor please, it is our intention to make a motion for a new trial, and at this time we ask that bail be continued on the defendants, their present bail.

The Court: The present bail will be continued on the defendants.

The new rules of criminal procedure require that in all criminal matters the matter of sentence shall be referred to the Probation Office for presentence investigation and report unless for good reason the contrary is shown.

Mr. Dixon: That is agreeable with us.

The Court: This is not ordinarily the type of case involving moral turpitude. What is your suggestion concerning the matter of sentence?

Mr. Dixon: It is entirely agreeable with the Government, your Honor, that the matter be referred as suggested to the Probation Department for the reports to be made available to the Court, and at the time the matter comes up for sentence the Government will at that time be prepared to make its recommendations for whatever consideration the Court may care to give them at the time in passing sentence.

The Court: It is not a matter of request of the defendants, so the defendants will lose no possible rights by the reference because, contrary to the practice in the Superior Court, the request need not be made in the Federal Court for reference to the Probation Department.

This is May 7. The record is long and I suppose that the defendants will probably need some time in the matter of preparing a motion for a new trial. I think May 26 would be sufficient. That would be three weeks from last Monday.

Mr. Margolis: That will be entirely satisfactory, your Honor.

The Court: May 26th at 2:00 o'clock. All further proceedings in this case against all the defendants are continued to the hour of 2:00 o'clock p.m. on May 26th, and each and all of the defendants are ordered and directed to return to this courtroom at that hour. In the meantime they may be released on their present bail.

The Court: The order continuing this matter until May 26th will be vacated, and the order instead will be to continue all matters and further proceedings in this case until May 21st at the hour of 2:00 o'clock p.m. of that day, and all defendants are ordered and directed to return at that date and hour.

Mr. Rubin: May the record also show, if your Honor please, that the defendants may withdraw those exhibits consisting of the membership application cards of all the units?

The Court: Whatever numbers they are, let us put them in the record.

Mr. Rubin: I do not believe all of the exhibits are here.

The Court: The defendants, by stipulation, may withdraw Exhibits 43, 44, 45, 42, 42-B, 42-A, 45-A.

Mr. Rubin: And may the record also show, if your Honor please, that the ledger of books and the membership application cards for the Newport unit and the Santa Monica-Redondo unit have already been withdrawn by the defendants. The numbers of all the exhibits are covered by written stipulation on file in the record.

The Court: Very well.

(Whereupon, at 10:00 o'clock p.m., the court was adjourned.)

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 8th day of May, A.D., 1947.

.....

Official Reporter.

MOTION TO DISMISS INDICTMENT AND
OF CHALLENGE TO AND MOTION TO
STRIKE OUT THE ENTIRE TRIAL JURY
PANEL

* * *

No. 18842, Criminal; United States v. Local 36 of International Fishermen & Allied Workers, et al. Hearing on motion of the defendants to dismiss the indictment and of challenge to and motion to strike out the entire trial jury panel pursuant to notice thereof filed February 11, 1947.

* * *

Mr. Margolis: The defendants are ready.

The Court: Are the defendants present in person?

Mr. Margolis: I believe all of them with one exception, your Honor. I didn't have an opportunity to check them at the last moment.

The Court: The Clerk will call the roll. While the defendants have filed a waiver, the order of the Court will be that it is necessary for them to attend throughout these proceedings.

The Clerk: Jeff Kibre.

The Defendant Kibre: Present.

The Clerk: Gilbert Zafran.

The Defendant Zafran: Here.

The Clerk: Clifford C. Kennison.

The Defendant Kennison: Here. [5*]

* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

The Clerk: F. R. Smith.

The Defendant Smith: Here.

The Clerk: George Knowlton.

The Defendant Knowlton: Here.

The Clerk: Otis W. Sawyer. (No response)

The Clerk: W. B. McComas.

The Defendant McComas: Here.

The Clerk: Harry A. McKittrick.

The Defendant McKittrick: Here.

The Clerk: Arthur D. Hill.

The Defendant Hill: Here.

The Clerk: C. Lloyd Munson.

The Defendant Munson: Here.

The Clerk: Charles McLauchlan.

The Defendant McLauchlan: Here.

The Clerk: Robert M. Phelps.

The Defendant Phelps: Here.

The Clerk: Burt D. Lackyard.

The Defendant Lackyard: Here.

The Clerk: Floyd Sherman.

The Defendant Sherman: Here.

The Clerk: Ray J. Morkowski.

The Defendant Morkowski: Here.

The Clerk: All present except one, your Honor, Otis W. Sawyer. [6]

Mr. Margolis: Your Honor please, with regard to Mr. Sawyer, we understand that he had some domestic difficulties and we have tried to locate him and have been unable to locate him. We have information that he is out of the state but we don't know where. We have done everything possible that we could but we can't locate him.

The Court: Is he on bond?

Mr. Margolis: He is on bond, your Honor.

The Clerk: \$500 bond.

The Court: The bond will be ordered forfeited and a bench warrant will be issued for Mr. Sawyer.

The Clerk: Fixing bond in what amount, your Honor.

Mr. Margolis: I would like to state that we will continue our efforts, of course, to locate him. His wife doesn't know where he is.

The Court: Maybe the Antitrust Division and the FBI and the Marshal's Office will aid you from now on.

Mr. Rubin: We will be glad to cooperate.

The Court: The bond on the bench warrant will be \$2500.

The matter is called for trial this morning. The Clerk indicated that it was on a motion to dismiss.

The Clerk: There is also a motion to dismiss as well as the trial, your Honor.

The Court: Let me see the file.

(The document referred to was passed to the Court.) [7]

Mr. Margolis: Before proceeding, your Honor, may I move the association of Robert W. Kenny and the firm of Kenny and Cohn as associate counsel for all of the defendants except the one defendant represented by Mr. Garrett.

The Court: So ordered.

Mr. Garrett is representing Mr. Sherman?

Mr. Garrett. That is right.

The Clerk: Floyd Sherman is represented by Mr. Garrett.

The Court: Is Floyd Sherman here?

Mr. Garrett: He is present, your Honor.

The Court: Very well.

The Clerk: May I have the appearances for the Government?

Mr. Dixon: William C. Dixon, Special Assistant to the Attorney General.

The Court: James M. Carter by Howard V. Calverley?

Mr. Calverley: Yes, your Honor, appearing on the motion to dismiss and the motion to strike out the jury panel.

Mr. Rubin: Robert J. Rubin, Special Assistant to the Attorney General.

Mr. Schwartz: Benjamin F. Schwartz, Special Attorney, Antitrust Division.

Mr. O'Malley: Jesse R. O'Malley, Special Attorney, Antitrust Division.

The Court: Proceed.

Mr. Margolis: Your Honor please, at this time we would [8] like to move for the exclusion of the prospective jurors curing the presentation of the motion to dismiss and the challenge to the jury panel.

The Court: You have two motions, one to dismiss the indictment on the ground that the grand jury which returned the indictment was selected in a manner contrary to the laws announced most recently and currently by the Supreme Court; and the other is a challenge to the talesmen on the trial

jury, which is subsequent and separate panel. Is that correct, you have two motions?

Mr. Margolis: That is correct. However, the method of selecting the grand jurors and the trial jurors is such that the two motions, as far as proof is concerned, are interwoven. There can be no separation as far as proof is concerned because both the grand jury and the trial jurors were selected in the same manner, as I understand it, and from the same source.

The Court: I am a little puzzled as to procedure. Since the receipt of the motions I have been reading the cases and the law in connection with it. I do not think that I can go quite as far in connection with this matter as Justice Roberts did when he dissented in the *Mahnich v. Southern Steamship* case, 321 U. S. 96, when he said: "If litigants and lower Federal courts are not to (follow and apply the law as clearly announced) the law becomes not a chart to govern conduct [9] but a game of chance; instead of settling rights and liabilities (and duties), it unsettles them."

I cannot find in the law any guide or method of procedure. The Federal Rules of Criminal Procedure, which have been adopted since the decision of the Supreme Court in the case of *Mahnich v. Southern Steamship*, give me no indication there. So it would seem to me, and the thing that puzzles me and perhaps counsel on one side or the other can aid me in connection with it—it would seem to me that your challenge to the trial jury could not be made until you had 12 men in the box and until

they had been examined for cause, because the constitutional command is that it shall be an impartial jury. I may be in error on that. I would like to have some suggestions from the counsel, if anybody has any.

Mr. Margolis: I may say this, your Honor. In the Thiel case the trial jury which was finally obtained actually had on it five of the classes, within those classes of persons which were excluded from the panel. The Court in that case held that it wasn't a question as to whether or not an impartial jury had been obtained, but whether the panel from which the jurors were drawn was obtained in an impartial manner, in such a manner as to constitute a fair representative cross-section of the community or utilizing a system designed to achieve that kind of a result.

I think that the question that is presented at this time [10] is not whether the trial jury that can be or might be obtained from the panel is a fair trial jury or a proper trial jury or it is a constitutional trial jury, because I believe under the Thiel case that is immaterial as far as this particular motion is concerned, the question is whether the panel——

The Court: You mean it is immaterial whether your jury is actually impartial?

Mr. Margolis: As far as this question is concerned, yes, your Honor. I would say that that is so, as far as the Thiel case is concerned, because in the Thiel case, as I say, there were five persons on the final jury, or on the jury panel from the excluded class, but it didn't make any difference be-

cause it was held in that case that the method of selection of the jurors for service on the jury panel was improper and that that was the error, that was the wrong against which the motion was directed.

The Court: In that case the wrong consisted of excluding men who worked by the day, although there were five wives of men who worked by the day on the jury. They said it was an exclusion of an economic class.

The logical extension of that is that the husbands who work by the day are in a different economic class than their wives. Now where do you draw the line unless you seek an impartial jury, and how do you know until you get the jury in the box but what you have men who might today not be long-shoremen or laborers or work by the day but who maybe last week or last month were?

Mr. Margolis: I would like first of all to renew my motion at this time for the exclusion of the jury panel pending discussion.

The Court: Do you have any observations on the Government's side as to the method to proceed?

Mr. Calverley: No, your Honor. The effect of the Thiel decision, as I read it, is very much as counsel has stated it here. In fact, that was the criticism directed against the majority opinion by the minority. It was directed along those lines, namely, to the effect that it was more or less an academic question since the jury was composed of five persons of the same general economic class as the appellant in this case. But nonetheless in spite of that fact it was reversed by a majority of the court.

The Court: How much time will you want?

Mr. Margolis: You mean how long will this matter take?

The Court: Yes.

Mr. Margolis: I would estimate, as far as our presentation is concerned, about two or three hours.

The Court: How do you propose to proceed, by affidavit?

Mr. Margolis: No, I propose to offer testimony, your Honor.

The Court: Oral testimony? [12]

Mr. Margolis: Yes, your Honor, plus exhibits that have been prepared which will be offered through witnesses on the stand.

The Court: I dislike to just have the jury members of the panel wait around. How many witnesses do you expect to produce?

Mr. Margolis: I expect to produce two or three witnesses. When I speak of two or three hours, your Honor, I am speaking of our case, I am not speaking of how much time the Government will take. I think it would be safe to say, however, your Honor, that it will take all day.

Mr. Dixon: In view of the statement by counsel that he expects this argument to take at least three hours on their part and perhaps——

The Court: Argument? He said evidence. He didn't even get down to the argument.

Mr. Dixon: I would assume, your Honor, that it probably will take the rest of the day to dispose of this matter and accordingly suggest, subject to the Court's approval, that the jury might be dismissed for the day under those circumstances.

The Court: If you have two or three hours of direct testimony, I do not know how long the Government will want to cross-examine, and it is impossible to estimate that—are witnesses subpoenaed on both sides? [13]

Mr. Rubin: Yes.

Mr. Dixon: We have a witness here, Mr. Hansen or Mr. Smith.

The Court: On the trial of the merits?

Mr. Dixon: The Government has several witnesses under subpoena, your Honor.

The Court: I do not think that in view of your statement that you have two or three hours direct testimony, and counsel will want to argue the matter, I suppose—I do not know how long that will take—that rather than have the jury come back tomorrow and perhaps go through the same thing again, as well as the witnesses, that it might be preferable if we put the matter over for a day or two days, or even longer, in order that we could be assured of a disposition of this preliminary phase.

Is there any objection to the exclusion of the panel?

Mr. Dixon: We have no objection, your Honor.

The Court: Very well.

Mr. Kenny: I might interrupt, your Honor. I will also have another motion on which I have prepared about an 82-page memorandum, that while formally it should be heard after the jury has been sworn, I think we might more or less informally hear it also.

The Court: What is the nature of the motion?

Mr. Kenney: It will be a motion to dismiss on the [14] ground that the indictment does not state a public offense.

The Court: On different grounds than suggested here?

Mr. Kenney: Oh, yes. This is on the Sherman Act itself. Of course we made the formal objection to the testimony but we might, for the convenience of the jury, dispose of that during this interim period and it might be convenient to all if that were considered too.

The Court: Well, in order that everybody will not be pressed and crowded for time, I will have the jury come back next Tuesday, February 25, at the hour of 9:45, unless they have need for a jury elsewhere in the meantime.

The Clerk informs me that you are wanted in Judge O'Connor's courtroom forthwith. The jury members of the panel will go from here to Judge O'Connor's courtroom, Courtroom No. 7, at the other end of the building on this same floor.

Do you have any additional affidavits to offer on either side?

Mr. Calverley: If the Court please, the plaintiff wishes to offer the affidavit of Mr. Arvin H. Brown, the jury commissioner for this district, a copy of which has been handed to counsel for the defendants.

The Court: A copy has been served?

Mr. Calverley: A copy has been served, your Honor.

The Court: Very well. That will be received and filed.

Mr. Calverley: Mr. Smith, the Clerk of this court, has [15] an affidavit which we wish to file in this proceedings, and the original of which Mr. Smith has now in the courtroom and will be filed at this time, a copy of which has been left with counsel.

Mr. Margolis: Yes, we received a copy.

The Court: I might say preliminarily, in connection with the motion to dismiss the indictment on the ground that the grand jury was improperly paneled, that were it not for the fact that the rules and standards which must be followed lack considerable clarity by virtue of the decisions of the Supreme Court touching the matter, I feel that I would be not only justified but I would be required in the exercise of what has been referred to as the sound judicial discretion to deny the motion on the ground that it is not timely. In this case the indictment was returned sometime last year, I believe that it was set for trial in November, is that correct?

Mr. Dixon: That is right.

The Court: It was set for trial in November and this motion to dismiss was filed only a few days ago. There is no showing of hardship. The statement is supported by an affidavit by Mr. Margolis that he had been busy elsewhere, but I notice that the defendants here are not lacking in counsel. There is the firm of Katz, Gallagher & Margolis, each of

whom are good lawyers, as well as a firm having five names in San Francisco, and Mr. Kenney, none of whom lacking in acumen, [16] intelligence or industry. As I say, I would feel justified in denying the motion summarily and preemptorily on the ground that it was not timely filed, except that from the state of the cases there appears to be no easily or readily ascertainable standard. Perhaps counsel in the course of the argument can point one out to me. The matter therefore should proceed on the basis of hearing whatever the parties have to offer in support of their motions in order that I may rule upon them and make a record for the Supreme Court to determine whether or not they should, in the exercise of their power of the supervision of the administration of justice, take the question, or pass upon it, or reverse whatever decision I reach.

So we will proceed. Where is the second affidavit?

Mr. Calverley: It is here, your Honor.

The Court: By the way, the order directing the jury to return next Tuesday will be vacated because the jury is sent to another courtroom and when we get ready for trial I will have the Clerk call a jury, in the event I should decide against these motions.

Very well. Proceed. I have read the affidavits.

Mr. Margolis: At this time, if your Honor please, I would like to call Mr. Smith to the stand.

EDMUND L. SMITH

called as a witness by and in behalf of the defendants, having been first duly sworn, was examined and testified as follows: [17]

The Clerk: Will you state your name?

The Witness: Edmund L. Smith.

Direct Examination

By Mr. Margolis:

Q. What is your position with the court, Mr. Smith?

A. Clerk of this court, Southern District of California.

Q. How long have you held that position?

A. Since June 1, 1942.

Q. As such Clerk, do you keep and maintain records relating to jury panels from which both trial jurors and grand jurors are selected?

A. Yes, I do.

Q. Will you state whether or not trial and grand jurors are selected from the same sources?

A. They are.

Q. Once lists of persons to serve on this grand jury or trial jurors are obtained, what is done by you?

A. The mechanics of that procedure are that the addresses are first zoned now by the mailing zone, and then envelopes are typed with name and address on them, and a questionnaire enclosed in the envelope with a return addressed envelope to the Clerk.

(Testimony of Edmund L. Smith.)

Those are gotten out as time and my clerical force permit, [18] and it is limited to that extent.

When the questionnaires are returned they are given to a clerk or assistant to place in alphabetical order according to the name, and then cards are typed from those questionnaires with the name and address and zone number on each card.

Then from the cards typed the tickets, which are to go into the jury box, with just the name of the prospective jurors thereon.

That is what is done up to the time of placing the names in the box by the jury commissioner and myself.

Q. Are all of the names placed in the box at the same time or are names added to the box from time to time?

A. Names are added from time to time. When we empty the box we gather what cards and tickets have been made up at that time and place them in the box. Usually we are limited on time in doing that because the venire must be drawn in sufficient time contemplated ahead for the preparation of the venire, the mailing lists and the issuance by the Marshal of the summons.

Q. Will you state how and when grand jury panels and trial jury panels are drawn from this box?

A. Usually the names are drawn from the box by myself in the courtroom or the judge's chambers, the senior judge's chambers.

(Testimony of Edmund L. Smith.)

Q. When I said when, I meant at certain times of the [19] year or when ordered by the court. When are names drawn from the box, both for grand jury service and for trial jury service?

A. Only upon order of the court.

Q. With respect to grand jurors, is that done twice a year?

A. That is done immediately before, a month or so before, the commencement of each term.

Q. And there are two terms each year?

A. Two terms in this division. I assume you are speaking of this division of the court?

Q. That is right. You have so understood all of the questions that I have put to you so far?

A. That is right.

Q. And all of my questions will be directed to this division and to your practices.

A. Yes, sir.

Q. Now how many names are drawn from the jury box for grand jury service?

A. Well, how far back do you want me to contemplate?

Q. What was the practice in 1946?

The Court: Let us get the record straight on this matter. This indictment was returned on August 25, 1946. Upon what date was the grand jury impaneled, Mr. Clerk, that returned that indictment? [21]

The Witness: That grand jury was impaneled February 6, 1946; Wednesday, February 6, 1946.

(Testimony of Edmund L. Smith.)

Q. (By Mr. Margolis): When were the names drawn from the box, or approximately when were the names drawn from the box from which this grand jury was selected?

A. I intended to bring that card with me. I believe it was in December of '45.

* * *

Q. (By Mr. Margolis): Now at that time, whether it was December or about December, 1945, how many names were drawn from the box for grand jury service? A. Fifty names.

Q. What was done with those 50 names?

A. Those 50 names were typed on a venire and a venire issued to the Marshal.

Q. Go on.

A. With the names, addresses, mailing zone numbers, upon the registry mail list which I prepare for the Marshal.

Q. Those persons who had been selected were then ordered to appear in court, is that right?

A. That is right. [21]

Q. And before whom were they ordered to appear? A. Before the senior judge.

Q. All 50 of the persons whose names were drawn were so ordered to appear, is that correct?

A. The venire was so issued to the Marshal.

Q. No excuses to any individuals were made by yourself or anyone else prior to the date of the required appearance of these persons in court?

A. None, none; never.

(Testimony of Edmund L. Smith.)

Q. In what manner, if you know, were the 23 persons on the grand jury selected from the 50 persons summoned as you have indicated?

A. The venire, as I say, was issued in the latter part of December perhaps and returnable on February 6. In the interim requests by mail and affidavits for exemption, claiming exemptions and excuses, were transmitted to the senior judge, and those who were excused by the judge were so noted upon the list, and from the remaining panel 23 were drawn by chance from a jury box in open court on the return day.

Q. Were these excuses made prior to February 6, 1946 or at that time?

A. I haven't checked that. It can be ascertained from my records, however.

Q. Let me go then to the next question——

The Court: What is the practice in that connection? [22]

The Witness: The practice is where an exemption is claimed and the senior judge excuses the juror in advance of the return date, that prospective juror is notified, either by mail or otherwise, so that the juror will not have to appear on that date.

The Court: What is the practice in connection with excuses offered at the time they appear, do you know?

The Witness: The judge at that time that the jury is ordered to appear states to those present, "Any having excuses to offer may present them to the court at this time."

(Testimony of Edmund L. Smith.)

Q. (By Mr. Margolis): And if the Court thinks that the excuses are proper they are excused at that time, is that correct?

A. They are excused, and only those names of those remaining are placed in the box.

The Court: And 23 of them drawn in open court?

The Witness: Twenty-three are drawn in open court by chance.

Q. (By Mr. Margolis): How many names were there remaining after excuses in February 6, 1946 when that grand jury was drawn and impaneled?

A. My recollection is that of those totally excused prior and at the time, there remained only about 27 or 28, perhaps it might be 29, I am not sure. [23]

Q. But somewhere between 27 and 29?

A. Yes.

Q. You used the phrase "totally excused." What did you mean by that?

A. Totally excused, of those that were excused at the time on the return date, in open court and those excused prior to that date.

The Court: You mean the total of the two?

The Witness: The total of the two.

Mr. Margolis: I see.

Q. Then the 23 people so selected were impaneled as the February 1946 grand jury?

A. That is right.

Q. And that is the grand jury that returned the indictment in the case now being heard?

(Testimony of Edmund L. Smith.)

A. That is the grand jury for that term in which the indictment was returned.

Q. Mr. Smith, is this method that you have described of selection of the grand jury for the February, 1946 term the method that has been generally in use, or is that a different method?

A. I may say that during the war, in 1941 and during the period that the Army was organized, we had great difficulty in obtaining jurors and we had to draw a great many more to obtain sufficient names for the panel.

The Court: What do you mean by that? You mean there were 50 on that grand jury and sometimes you had more?

The Witness: Sometimes we had more.

The Court: How many more?

The Witness: 100, 150.

The Court: That is the practice in the last five years?

The Witness: Yes.

The Court: Have you ever had more than 150?

The Witness: I would have to check that. I would say rarely would it go over 100 or 150 for the grand jury.

Q. (By Mr. Margolis): In other words, you mean that you would have to draw 100 to 150 names from the box in order to secure 23 or more names from which a grand jury could be drawn, the rest being excused because of the urgency of war business, is that right? A. That is right.

(Testimony of Edmund L. Smith.)

The Court: You mean you would have to draw 100 or 150 names from the master box, not the box in the courtroom?

The Witness: The master box.

The Court: That is to say, that would be the venire you would send to the Marshal?

The Witness: The writ of venire contained 100 or 150 names. [25]

Q. (By Mr. Margolis): Aside from that variation which took place during the war, has the practice for a number of years been, and is it now, as you have described it with regard to the February 1946 grand jury?

A. Prior—I can't tell you just when that was inaugurated—but prior to a certain date, say prior to the war, the questionnaires were not used.

Q. When did the questionnaires come into use?

A. Approximately 1943.

The Court: Did that follow the Conference of Senior Circuit Judges in relation to the matter of selecting jurors?

The Witness: It did.

The Court: By the way, while you are on the question of questionnaires, have you a blank one?

The Witness: I didn't bring them into court.

Mr. Margolis: We are going to ask for all of the questionnaires. We are going to offer all of the questionnaires in evidence, your Honor, because we have exhibits based upon those questionnaires.

The Court: I thought if we had a blank one now it would be useful.

(Testimony of Edmund L. Smith.)

Mr. Margolis: I think it would be useful.

The Witness: I will have one brought in.

The Court: We can put it in the record at this point. [26]

Mr. Margolis: Very well, your Honor.

Q. Since 1943, and with the variation as to numbers which you placed during the war, has the practice been, and is it now, with regard to selection of grand juries the same as it was for the selection of the February 1946 grand jury?

A. The practice is the same. However, we have not stated here fully the *modus operandi* of obtaining the names.

The Court: I think he is going to get to that in a few minutes, aren't you?

Mr. Margolis: As a matter of fact, your Honor, under my theory of the matter I am not concerned with the matter of getting the names. We are relying entirely on a different approach. That is a matter of, shall we say, defense to the motion.

We propose to offer statistics with regard to the composition of this grand jury which will indicate that it is not possible by chance to have gotten the type of a jury if any proper method were used. If a method designed to secure a cross section of the community were used, it would simply be impossible to get the kind of a panel that we have.

I am prepared to argue the law at the appropriate time. If your Honor wants it now I will proceed now.

(Testimony of Edmund L. Smith.)

The Court: Your question was directed to the practice of securing grand jurors and I do not know that the Clerk answered it. [27]

The Court: Confine your answer to the question of the general practice, is the general practice still followed that as you have outlined or does it vary as to the number of names on your venire or in any other particular?

The Witness: It varies as to the names on the venire as to the number of names used for the last two years.

The Court: The number of names?

The Witness: The number of names.

The method that I have described should be supplemented by the fact that I go into the cards of 25,000 or 30,000 approximately and select names at random through the alphabet of those jurors who have not served for the past three or four years.

The Court: You are getting now into the general method of getting names. For the moment I would like to have you confine your answer to the method of selecting the grand jury, beginning with the number on the venire and going through the procedure you have just described.

The Witness: The method is the same except for the number of names.

The Court: It varies from time to time, is that correct?

The Witness: The number of names?

The Court: Yes, on the venire.

The Witness: Yes.

The Court: Very well. [28]

(Testimony of Edmund L. Smith.)

Q. (By Mr. Margolis): Aside from that, the placing of names in the box, the manner of granting excuses, the time when excuses are granted and selection of 23 names in open court, the method is the same, is that right?

A. It is the same; that is right.

Q. When was the panel of trial jurors selected which will be utilized in this case?

A. The present panel was drawn from the box on January 2nd.

The Court: When you say the box, you mean what we can refer to as the master box as distinguished from the jury box?

The Witness: The master box, the box in which the jury commissioner and clerk place the names.

The Court: May we refer to that throughout the proceedings as the master box?

Mr. Margolis: Yes, your Honor.

The Court: In order that it may be identified and distinguished from the box used in the courtroom.

Mr. Margolis: You might call it the master box and the courtroom box, if your Honor has no objection.

The Court: Very well.

Q. (By Mr. Margolis): What was that date again? A. January 2nd or 3rd. [29]

Q. 1947? A. 1947.

Q. You mean the master box, it was drawn from the master box, is that right?

A. Drawn from the master box; yes.

(Testimony of Edmund L. Smith.)

Q. When were the names placed in the master box prior to the date of the drawing of the panel from the master box in January of 1947?

A. Shortly prior thereto.

Q. How many names were placed in the master box at that time?

A. There were 637 in the box, as I recollect—oh, you are talking about this panel—855.

Q. In other words, so that we are entirely clear, Mr. Smith, sometime shortly before January 4th or 5th, 1947, 855 names were placed in the master box, is that right? A. That is right.

Q. Now were those names placed in there to be used over any specific period of time?

A. They were placed in there pursuant to order of court.

Q. Do you have that order here?

A. I have a certified copy of the order.

Q. May I see it?

A. (Producing document.)

Mr. Margolis: I will ask, your Honor, that this certified copy of an order dated January 2, 1947, in the United States District Court, Southern District of California, in the matter of placing of names of citizens in jury box for service as grand jurors and trial jurors at Los Angeles, California, in the Central Divisin of the Southern District of California, be marked as Defendant's Exhibit A for the purpose of this motion.

The Court: It will be so marked.

(The document referred to was received in evidence and marked Defendant's Exhibit A.)

(Testimony of Edmund L. Smith.)

Q. (By Mr. Margolis): Mr. Smith, has the practice in the past been that you receive an order of the kind which is in evidence as Defendant's Exhibit A at definite intervals or simply from time to time? A. From time to time.

Q. Does it occur usually about once a year?

A. In the last, I would say, two years it has.

Q. Occurred once a year A. Yes.

The Court: What precipitates it?

The Witness: The exhaustion of the names in the box primarily; the names remaining being under 300.

The Court: In other words, as soon as the names are under 300 the matter is called to the attention of the senior [31] judge who makes an order identical with this one or similar?

The Witness: Similar; almost identical each time.

Q. (By Mr. Margolis): When you receive that order the names remaining in the box from the group previously placed in the box were removed and a new group of 850 or 855 names placed in there?

A. Some of those that were in there will be placed back.

Q. Some of those will be placed back?

A. Yes.

Q. How do you determine which ones are placed back?

A. They usually are. If we have questionnaires for them now, and there would have been questionnaires for the last two years.

(Testimony of Edmund L. Smith.)

Q. In other words, since you have been having questionnaires filled out by each prospective juror, when an order like this has been made you have, in effect, kept in the box the names of the jurors who had not yet been drawn from the box and in addition added a number of new names, is that right?

A. That is approximately correct.

Q. Well, I wonder if you would state in what respects, if any, that that is incorrect?

A. I can't recollect exactly. Last December, at the time the jury commissioner and I emptied the box, there were [32] approximately only 17 names left. I believe that some of those names went in, but I am not sure.

Q. Do you know how it was determined which names should go in and which should not?

A. We would have the tickets and the cards and the questionnaires. If there were any of those elements missing, the name would not go in.

Q. Didn't you have a ticket and a card and a questionnaire for each person or each name that was placed in the box prior to the time that it was placed in the box?

A. There should be; yes.

The Court: Do you have that blank questionnaire there now?

The Witness: I do.

The Court: We will mark that Exhibit B. This is what you mean when you refer to a questionnaire?

The Witness: Yes.

(The document referred to was received in evidence and marked Defendant's Exhibit B.)

(Testimony of Edmund L. Smith.)

The Court: Have you a form of card also?

The Witness: We have the cards here.

The Court: Is this a form of card?

The Witness: Yes.

The Court: Let me see it a moment.

(The document referred to was passed to the Court.) [33]

The Court: In other words, this is an ordinary 3 x 5 card?

The Witness: A 4 x 6 card.

The Court: A 4 x 6 card?

The Witness: Yes.

The Court: With the name, the one that I have here, H. W. Amelung, manager of poultry products, Southern California, with a lot of numbers that are scratched out, two addresses that are scratched out, and different dates and names of judges, and so forth. That is what you mean by the "card"?

The Witness: That is right.

The Court: What do you mean by the ticket?

The Witness: The ticket is a little slip of similar paper, merely a strip, perforated.

The Court: It is the same kind of a ticket that the clerk has the names of the jury in the jury box in the courtroom?

The Witness: That is right.

The Court: That is a ticket about three-quarters of an inch wide by three inches long?

The Witness: That is right.

The Court: What does that have on it?

The Witness: Just the name.

(Testimony of Edmund L. Smith.)

The Court: So that when you refer in your testimony to a questionnaire you refer to Exhibit B, and when you refer to [34] Exhibit B, and when you refer to a card you refer to the 4 x 6 cards that you have mentioned, and by the ticket you refer to the ticket you have just described?

The Witness: Yes.

The Court: Let us go back to the question counsel asked. You said that when any one of the three of those were missing, that the name did not go back in the box, is that right?

The Witness: That is right.

The Court: That is, if the questionnaire is missing?

The Witness: If the questionnaire is missing.

The Court: How might it be missing?

The Witness: Misplaced. Prior to the time of the jury commissioner and the clerk getting together to place the names in the box, the questionnaires, the cards and the tickets are all checked and those that are not checked are not placed in the box.

The Court: What do you mean by checked? Checked against what?

The Witness: The cards typed and checked with the questionnaires, the tickets typed and checked with the cards.

The Court: That is as to the name and address?

The Witness: Yes.

The Court: All you have on the card is the name, address, occupation—do you have that in each instance?

(Testimony of Edmund L. Smith.)

The Witness: No, I notice on this old card it has one [35] of those on, but that has not been done by me.

The Court: That was a prior jury clerk?

The Witness: A prior clerk.

The Court: The card now merely has the name and address on it, is that correct?

The Witness: Practically all the cards contain merely the name and address and zone number.

The Court: And zone number?

The Witness: Yes.

The Court: So you check those before you put the names in?

The Witness: That is right.

The Court: And the Exhibit B might be missing because it was misplaced?

The Witness: Misplaced.

The Court: The card might be for the same reason?

The Witness: Same reason.

The Court: What about if somebody died, do you leave their names in there?

The Witness: If we know if it is called to my attention that name is taken out.

The Court: Do you check against the death records?

The Witness: No. That is one of the purposes of sending out the questionnaires. When we get a return from a dead prospective juror we take his name out. [36]

(Testimony of Edmund L. Smith.)

The Court: In other words, the only time that you ascertain whether or not a name has been on the questionnaire and on the card or in the box or in any one of the places of the three, is when there is a return from some message that you have sent him either to appear, to answer a questionnaire or to do jury duty?

The Witness: Yes, or others if we have been informed from any source that a person is deceased or is moved out of the district.

The Court: Then in summary, your answer is that unless you have been notified that the person whose name was in the box is dead, has moved out of the district, or you have misplaced either the questionnaire or the card or the ticket, the name goes back?

The Witness: Usually.

The Court: Well, is there any element of chance in putting the name back? You say "usually." What other reason is there?

The Witness: Sometimes they haven't been placed back.

The Court: Why is that? That is what counsel wants to know and that is what I would like to know. Is it for any particular reason, or what reason is it?

The Witness: The reasons that I have mentioned. I believe in most cases the names are placed back. The questionnaires and cards are checked with the names in the box so [37] there will be no duplication of names, and sometimes a new card is

(Testimony of Edmund L. Smith.)

made up from a new list furnished by the jury commissioner, and we find that we already have a card for that juror. All of the cards are checked, all the new cards are checked, with the names then in the box and those for which we already have cards and who have served in the past, or in what is called the available box.

The Court: Who puts these names back in the box, do you or the jury commissioner, or both of you?

The Witness: Both of us.

The Court: Together?

The Witness: Whatever names go in the box.

The Court: I mean, from those that were taken out, is that your choice or his choice?

The Witness: Both. He puts in one and I put in one. Each of us alternately place a name in the box.

The Court: All, however, from this card index?

The Witness: From the card index compiled first from the questionnaires and then from the cards.

The Court: And the names are secured how? By you and by the commissioner? I mean who secures the names?

The Witness: In the first instance?

The Court: Yes.

The Witness: The jury commissioner primarily has furnished the bulk of the list. I have obtained

(Testimony of Edmund L. Smith.)

from time to [38] time, you might call them minor lists in comparison with the percentage of names obtained.

The Court: Very well. Excuse the interruption, counsel.

Mr. Margolis: It is very helpful, your Honor.

Q. Now from this group of names which were placed in the master box in 1947, when was the first drawing made and for what purpose?

A. On January 3rd two separate venires of petit jurors were drawn at that time, and the grand jury panel.

Q. All three on the same day?

A. The same day.

Q. Which was drawn first, if you recall?

A. I couldn't say. I believe they were drawn in order of the return date on the venire.

The Court: Which was the earliest return date?

The Witness: The earliest return date was the one of the petit jurors of 200.

Q. (By Mr. Margolis): That was the petit jury that was impaneled on February 3, 1947, is that right?

A. That is right. The next one drawn would be the 50 jurors returnable on the following Wednesday.

Q. Anyway, a few days after February 3, 1947?

The Court: That would be the 12th.

The Witness: The first Wednesday of February.

The Court: The first Wednesday would be February 5th.

The Witness: I believe that was the date.

(Testimony of Edmund L. Smith.)

The Court: February 5th is when the grand jury was returned?

The Witness: Yes.

The Court: When was the first trial jury returned?

The Witness: The first trial jury of 200 was Monday.

The Court: This is the third?

The Witness: Yes.

The Court: And the next?

The Witness: The next trial jury was, I believe, the term of February 17th and that was drawn next.

The Court: That was yesterday?

The Witness: Yes, sir.

Q. (By Mr. Margolis): That is the panel from which the prospective jurors to try this case will come, the panel on February 17th, is that right?

A. Well, with this qualification that there have been since drawn out 250 more returnable names next Monday, and of course if this case should not proceed to jury trial until the following March 10th it may be possible that there would be jurors from that venire.

Q. If the jury is selected prior to March 10th then it will come from the panel which was impaneled on February 17th, if all or part of the jury is selected after March 10th it is [40] possible that some of the jurors will come from that later panel?

A. That is right.

The Court: Will all the jurors come from the panel of the 17th or will any of them come from the panel of February 3rd? What do you do with those jurors?

(Testimony of Edmund L. Smith.)

The Witness: The only jurors that have been working up to the 17th, and the jurors who were qualified yesterday, were informed I believe in court to return for this trial, at least some of them.

The Court: Today?

The Witness: Today.

The Court: Let me get this straight now. You got 200 names on February 3, is that correct?

The Witness: Yes.

The Court: From that list of 200 names, how many jurors were selected?

The Witness: As I recollect there were something approximating 70.

The Court: From the 200 of yesterday how many were selected?

The Witness: I don't know. There were approximately 70 present in the courtroom, as my deputies inform me.

The Court: That would indicate from your custom that the remainder had been excused? [41]

The Witness: Or no return, deceased, moved out of the district or hadn't received the summons.

The Court: So that now there is available in this division and district for trial of either civil or criminal cases a total panel of approximately 150 who have been sworn and not excused?

The Witness: I would say between 100 and 150.

The Court: Now I first excused this panel until next Tuesday. I later revoked that order and announced that the Clerk would call a jury when notified. Now who does he call, who does he get, the February 3rd batch or the February 17th batch?

(Testimony of Edmund L. Smith.)

The Witness: Whatever it is in it.

The Court: Or both?

The Witness: Maybe both.

The Court: What do you mean, maybe both? Are they all just put in a batch there together and then called, is that what has happened?

The Witness: There are two boxes and the names in the first instance are placed only in the one box.

Mr. Margolis: May I interrupt? The witness doesn't speak very loudly. May I have the first part of the answer read?

The Court: He said there are two boxes and the names are placed in the first instance all in one box.

The Witness: That is right.

Q. (By Mr. Margolis): What do you mean by there are two boxes? What boxes are you referring to, two courtroom boxes as distinguished from the master box which we have been talking about?

A. No, we are not considering the master box at all there. This is after the jury is impaneled and those jurors who are subject to report at the direction of the court.

The Court: There is still a third box then.

The Witness: If you are talking about the third box in the courtroom, but we are not talking about the courtroom box, nor are we talking about the master box, we are talking about——

The Court: Another box?

The Witness: Two other boxes which the deputy clerk, acting as—call him a calendar clerk—when a

(Testimony of Edmund L. Smith.)

judge orders a panel, whatever number he orders, the names are drawn out of the first box.

The Court: Are they in that box on what we have described as tickets?

The Witness: Tickets.

The Court: Then the procedure, if I may summarize, is that on the February 3rd jury, after the excuses were done and the jurors, the 70 are selected, their names are put on strips or tickets and those tickets are put in a box which is kept by your calendar clerk? [43]

The Witness: That is right.

The Court: On February 17th they are put in another box, is that right?

The Witness: They are put in the same box.

The Court: They are put in the same box?

The Witness: Yes.

The Court: Then if I want a jury to start this case tomorrow and instruct the Clerk to call a jury panel, your calendar clerk reaches in that box and by lot takes out a ticket and calls that person on the phone and tells him to be here at 9:45 tomorrow, is that the procedure?

The Witness: Summons him by phone or otherwise.

The Court: Well, naturally. Now what is that other box?

The Witness: As the names of the jurors are used and they come back from the trial of a case, they are placed in the second box, and as the names are drawn out and used from the first box ultimately

(Testimony of Edmund L. Smith.)

all of the names will be in the second box. In other words, you are using the names of all those who have not served recently.

The Court: All right. Now you have another jury of 250 coming in, or a venire rather, when?

The Witness: March 10th.

The Court: Now when you select those who are not excused and are qualified and sworn, those names go in that calendar clerk's No. 1 box, is that right? [44]

The Witness: That is right.

The Court: Along with whatever names remain in it?

The Witness: That is right.

The Court: So that if after March 1st I should try this case, or some other case, and call on the Clerk to get a jury, the calendar clerk reaches in and by lot picks the tickets out and summons them and instructs them to be there the next day?

The Witness: That is right.

The Court: Then when the No. 1 calendar clerk's box is empty, you start all over again and take them out of that box?

The Witness: That is right. That is one of the reasons for calling this jury that was impaneled yesterday to report today, because the first box had been emptied.

The Court: It was already empty?

The Witness: Yes.

The Court: Then the statement that you made a while ago I misunderstood. I understood that if,

(Testimony of Edmund L. Smith.)

as and when this case goes to trial and the Clerk is instructed to call a panel of jurors he will select it from whatever jurors have been impaneled since the beginning of the February term?

The Witness: That is right.

The Court: And unused, that is, who have not tried a case?

The Witness: That is right.

The Court: Very well. [45]

Q. (By Mr. Margolis): Mr. Smith, with regard to excuses for prospective trial jurors, are all of those excuses granted or denied, passed on, in other words, by the senior judge and by no one else?

A. Or some other judge acting in his stead.

The Court: That is, if the senior judge is not available?

The Witness: Yes; out of the division or district.

Q. (By Mr. Margolis): But it is a function which is performed by whatever judge is acting as senior judge?

A. That is right.

Q. And by no one else, is that right?

A. By no one else.

The Court: That is to say, neither the clerk nor the commissioner pass upon the excuses?

The Witness: No.

Q. (By Mr. Margolis): With regard to the February 1946 grand jury, what records do you have at the present time? Do you have both the cards and the questionnaires or just the cards?

A. Of the questionnaires I have only been able

(Testimony of Edmund L. Smith.)

to find the questionnaires for the 23 impaneled. I haven't been able to find any of the others who were excused or not impaneled. [46]

Q. You do have the cards for the entire grand jury for which the February 1946 grand jury was selected, is that correct? A. Yes.

Q. And you have handed me those cards?

A. That is right.

Q. These are the same cards that you turned over to people from my office, from the office of counsel representing the defendants, and from which they obtained information, is that right?

A. That is correct.

Mr. Margolis: I don't know, your Honor, exactly what procedure we should follow with regard to introducing these cards and questionnaires in evidence. I might state at this point, so that we can determine the best procedure to be followed, what we intend to do.

* * *

I therefore offer these cards in evidence, but we certainly have no objection to their being withdrawn if needed for other purposes.

The Court: All right. They will be received in evidence and marked as Defendants' Exhibit C.

(The document referred to were received in evidence and marked Defendants' Exhibit C.)

Mr. Margolis: We suggest that each card should be marked. However, if the cards and questionnaires are all marked we will have a lot of marking. It

(Testimony of Edmund L. Smith.)

seems to me that if they are bound together that way they might be reasonably safe.

The Court: They will be marked as Exhibit C and they will be separately referred to, I suppose, by name. In other words, they will be C-Amelung or C-somebody else, whatever the name might be so far as the cards are concerned.

Mr. Margolis: Very well.

Q. You do have, Mr. Smith, the questionnaires for the grand jurors who were actually selected as grand jurors and who served as grand jurors for the February 1946 term?

A. Yes. I believe that I gave you the 23.

Q. Yes. You do not have them in court at the present time, is that right?

A. I do not have them here at present.

Mr. Margolis: I will ask your Honor that a number be reserved for those questionnaires.

The Court: Are they in one package? Can Mr. Hocke get them?

The Witness: Yes. They are on my desk.

The Court: Defendants' Exhibit D

(The documents referred to were received in evidence and marked Defendants' Exhibit D.)

Mr. Margolis: I am going to inquire with regard to all the questionnaires.

The Court: All of the questionnaires for the 25,000 names?

Mr. Margolis: No, for all of the questionnaires for the September 1946 panels which were made available to us, and all of the questionnaires of the 850 persons who were placed in the box.

(Testimony of Edmund L. Smith.)

The Court: This might be an appropriate place in the proceedings to find out about this questionnaire. Do you mind the interruption?

Mr. Margolis: No, your Honor.

The Court: By your affidavit you said there was something like 25,000 or 30,000 names. "At the present time there are files in my office containing approximately 25,000 or 30,000 names of persons for jury service in this district." Do you have questionnaires for each of those?

The Witness: No, sir.

The Court: How many do you have questionnaires for? [49]

The Witness: That I don't know.

The Court: How do you determine when to send a questionnaire or whether or not you do have a questionnaire?

The Witness: Each time that names are obtained by me from this reserve of 25,000 or 30,000 names I select all the names at random through the alphabet of those who have not served during the past three to five years, and questionnaires are mailed to those.

The Court: So that no questionnaire goes to a person until his name is or has been actually selected to go on the venire?

The Witness: No, that is not so.

* * *

Q. (By Mr. Margolis): The 25,000 or 30,000 cards that you refer to, are those cards of persons who at some time or other in the past have served as jurors or grand jurors?

(Testimony of Edmund L. Smith.)

A. Both served, may have served or may have been excused or may have not served at all.

Q. But whose names were in the master box, or were selected for placing in the master box, at some time in the past, is that right?

A. Lists were made up and the cards typed for future [50] use, or they have been used.

Q. And when you selected the 855 names to go into the box, as you have testified here, 1947, those 25,000 or 30,000 cards was only one of the sources that you used for obtaining names, is that right?

A. Yes. And, as I recollect, on that panel there were very few of those used.

Q. In other words, you go to a number of sources, and one of the sources that you go to for obtaining persons whose names should go into the master box is these 25,000 or 30,000 cards of jurors who have previously been selected and placed in lists?

The Witness: That is correct.

The Court: Of prospective jurors?

Mr. Margolis: Prospective jurors previously selected.

The Court: I understood some of them were jurors, some of them had never served, and so forth.

Now getting back to this questionnaire, when do you decide to send the names in the box a questionnaire?

The Witness: For instance, I am having one of the clerks prepare and mail questionnaires to, as I recall now, 1000 names in the box in addition to any lists that I may have from the commissioner.

(Testimony of Edmund L. Smith.)

Mr. Margolis: May I interrupt you?

Q. When you say names in the box, I wonder if you would [51] in each case be specific as to which box you refer to. You don't mean names in the master box, they don't go into the master box until you get a questionnaire.

A. That is correct.

The Court: This is a reserve box.

The Witness: I mean the cards, I mean from the index cards. I shouldn't have said box.

The Court: Isn't it a box?

The Witness: These cards are filed in drawers.

Mr. Margolis: I am sorry I interrupt you.

The Witness: During the year 1945, I believe, or 1944 perhaps, we mailed out between 5000 and 6000 questionnaires to prospective jurors and obtained about 1800 returns, and later questionnaires were mailed out, perhaps between——

The Court: Let's find out when you send questionnaires to those people whose names are in that drawer.

The Witness: I am sending them to them approximately all the time, whenever I can spare the clerical help to get them out.

The Court: Regardless of whether the name has been taken by you to drop into your master box?

The Witness: Yes.

The Court: In other words, it is a continuing process, if I may make the suggestion, a continuing

(Testimony of Edmund L. Smith.)

process by which you are endeavoring to secure a questionnaire on file for [52] every name that is in your drawer?

The Witness: That is right.

The Court: So that when you decide to select it you have both the card and the questionnaire?

The Witness: Well, we will have a card and a questionnaire and then we will make up the tickets therefrom.

The Court: We will get to the tickets later. The reason you do not now have questionnaire for all of your 25,000 or 30,000 names in the box is due to lack of clerical help?

The Witness: That is right.

The Court: But every name which has been taken by you or has been put in the master box has first had a questionnaire sent to them and received by you?

The Witness: In the last two years.

The Court: In the last two years?

The Witness: Yes.

The Court: All right. And that questionnaire is Exhibit B?

The Witness: That is correct.

The Court: Is there anything on the names in those boxes to indicate the race, color, religion or previous condition of servitude.

The Witness: Nothing.

The Court: Is there anything on the names in the box which indicates their occupation? [52]

(Testimony of Edmund L. Smith.)

The Witness: Not on the cards. On the questionnaires some of them have occupations.

The Court: Is there anything that indicates their religion?

The Witness: Nothing, unless, as I recollect, some claim of exemption by a juror on the ground of a minister or Christian Science practitioner. That would be the only instance.

The Court: But there is no space or form provided for it and no systematic effort made to ascertain or disclose any of the things that I have indicated?

The Witness: Nothing.

The Court: By the way, while we are on the subject, the charge is made, I think, that negroes were excluded from the February 1946 grand jury.

The Witness: That is not true.

The Court: Can you tell from the cards whether they are Negroes or anything concerning their race or color?

The Witness: No.

The Court: How do you know that that is not true?

The Witness: They were drawn from there.

The Court: Did you see Negroes on the jury?

The Witness: I have seen them in the courtroom.

The Court: During that 1946 grand jury?

The Witness: I won't say on the grand jury, but on the petit juries. A lot of them were excused.

(Testimony of Edmund L. Smith.)

The Court: By the way, I think we can take notice—Mr. Calverley, you handled the 1946 grand jury?

Mr. Calverley: I did, your Honor.

The Court: Do you wish him to be sworn or can we accept his statement?

Mr. Margolis: No, he need not be sworn.

Mr. Calverley: Your Honor, my recollection is that when this grand jury was impaneled in Judge McCormick's courtroom, there was one Negro who was called and stepped forward and asked to be excused, and the judge excused him.

The Court: There were Negroes on one grand jury that reported to me last year.

Mr. Calverley: On the September 1946 grand jury there was one Negro who served throughout the term.

As to the grand juries prior to that time, the one prior to February 1946, there were no Negro on that one, as I recall. However, prior to that time I wasn't here and I don't recall and my statement would have to be made on information that there were a number of Negroes on the grand juries.

The Court: I think I can take judicial notice and state for the record that the trial jury in the September 1946 term—I handled the criminal calendar—I know that in one case I had two Negroes sitting in the twelve in the box of twelve. How many there were, I do not know, they were going and coming, but there were Negroes. [55]

(Testimony of Edmund L. Smith.)

Mr. Margolis: I want to say, because of the shortness of time we didn't make a study on that question.

The Court: The point was made in your affidavit.

Mr. Margolis: We had intended—if I may state what happened—we thought at the time that the affidavit was filed that we would deal with something like 200 or 300 questionnaires. We found out later on that we would have to deal with something like 1000 or 1200 questionnaires, and we had to limit our study.

Now the preliminary examination upon which the affidavit was based indicated to me—I am fairly familiar with the location of Negroes in Los Angeles—that there was a disparity of selections from the heavily populated Negro districts in Los Angeles, and that was what my affidavit was based on.

The Court: Do you expect to make that point?

Mr. Margolis: We are satisfied, your Honor, that the showing that we will make with regard to occupation will be sufficient. We are going to rely upon that.

The Court: You do not intend to rely on the asserted proposition that there was discrimination on account of race against members of the African race?

Mr. Margolis: That is right, because of the time element we haven't had time to gather the evidence.

The Court: Your answer to my question is in the affirmative?

(Testimony of Edmund L. Smith.)

Mr. Margolis: No, we do not intend to.

The Court: You do not intend to rely upon that?

Mr. Margolis: That is right.

hTe Court: Very well.

Mr. Margolis: We do intend to rely——

The Court: However, it is a matter of appropriate inquiry, is it not?

Mr. Margolis: I should think so, your Honor. I think that the Appellate Courts have indicated that it is the duty of the court on its own motion, if necessary, to make that kind of inquiry and I am of course not objecting.

The Court: It never occurred to me to make the inquiry because I have heard no discrimination against Negroes, due to the fact they have actually sat in the trial of cases and grand juries reporting to me as a judge, from which fact I now take judicial notice for the record.

Mr. Margolis: I might state, as far as the law is concerned, the case of *Smith v. Texas*, in that case there were Negroes both on the panel and on the grand jury but it was nevertheless held to be discrimination, that the mere presence of Negroes doesn't satisfy the test.

The Court: The test in that case, however, was different than in the other cases. The test in the *Smith v. Texas* case was whether or not equal protection of the law had been denied under the Fourteenth Amendment. No such test is applied [57] by the court in the *Thiel* case or the *Ballard* case or in the *Glasser* case, and none is indicated. That is one

(Testimony of Edmund L. Smith.)

of the reasons why I indicated at the commencement of this proceeding that the law lacks some clarity.

Mr. Margolis: I think, your Honor, that while the Thiel case was not based upon equal protection of the law, because it does not have to be, I think that discrimination with regard to occupation is equally a point as discrimination with regard to race, as far as the Constitution is concerned.

The Court: The Court said in the Thiel case that there wasn't any constitutional violations, no unconstitutional discrimination. There are in the Glasser case or in the Ballard case.

Mr. Margolis: I think, your Honor, they said their decision was not based upon constitutional grounds, and I think that the difference between the Thiel case and the Smith case is that in order to rely upon constitutional grounds the person claiming the denial of his rights must be one of the class discriminated against, whereas where it is merely a question of the administrative, supervisory functions of the Appellate Court, then the person raising the charge of the improper selection of the jury or grand jury need not be within the class discriminated against.

The Court: Well, maybe you can straighten me out on it, but it seems to me a little bit confusing because in the Thiel [58] case they did not base it upon any violation of any rule, violation of any statute, the denial of any constitutional rights at all, but merely upon their power to supervise the administration of justice by the lower courts, and

(Testimony of Edmund L. Smith.)

laid down no standard except the single one that I have indicated, that there was a discrimination of a class in their exclusion.

Mr. Margolis: In the Thiel case we are dealing with a constitutional point—I mean with an administrative point—and therefore injury to the individual was not material. The Court was concerned entirely there with whether or not the method of selection of the jury was a proper method.

The Court: I don't know. Proper by what method? Denial of due process?

Mr. Margolis: From an administrative process.

The Court: If they had said it was a denial of due process, then I would have had a myriad of decisions to which I could have recourse and ascertain what is meant by due process.

Mr. Margolis: If I may make this point, let's assume that we have a white defendant. As to him a jury from which Negroes are discriminated against, or where there are no Negroes, does not constitute a violation of constitutional rights because he is not within the class discriminated against. But as to a Negro, the absence of a Negro on the jury will go to the constitutional rights involved. So the absence of particular classes or types of persons may be [59] either a constitutional or an administrative violation, according to whether the person, the defendant in the case or the plaintiff in the case, is one of the class or group being discriminated against.

(Testimony of Edmund L. Smith.)

In other words, even the absence of Negroes from juries is not always a constitutional point. It only becomes a constitutional point when a Negro is involved. Similarly, the absence of certain economic groups from the jury may be either a constitutional point or a simple administrative point, as distinguished from a constitutional point.

The Court: I did not mean to interrupt and get on this discourse of the law. I think while we have the witness on the stand we ought to finish with him.

Mr. Margolis: I wonder if we could have the last question and answer.

The Court: The witness asks why we sent for the questionnaires.

Mr. Margolis: Are they here?

The Court: Yes.

Q. (By Mr. Margolis): I have here a number of questionnaires. On top of the whole group of questionnaires is a blue slip with the words "February term 1946, petit jury," and then down near the bottom of the list of questionnaires there is inserted a blue slip with the words on it "grand jury." I wonder if you could [60] explain what those slips and words mean.

A. The group of questionnaires placed under the top card which you have described purport to be the questionnaires of petit jurors impaneled for the February 1946 term.

The Court: You say they purport to be?

(Testimony of Edmund L. Smith.)

The Witness: I haven't examined or compared them and I can't accurately state that each one of them is.

The Court: What is the other one now?

The Witness: The other 23 questionnaires marked "grand jury" purport to be the questionnaires of those 23 jurors impaneled as the grand jury for the February 1946 term.

Q. (By Mr. Margolis): Unless there has been some clerical error in filing those questionnaires, they not only purport to be but they are what you say?

A. That is correct.

Q. And you know of no clerical errors in filing?

A. Not to my knowledge.

Q. Those questionnaires, both groups that you have identified, were also turned over to people from the office of the attorney representing the defendants from which they obtained information?

A. These are the same questionnaires; yes.

Mr. Margolis: I would like to offer as two separate exhibits, if your Honor please, because different exhibits will [61] be based upon them, the questionnaires for the February 1946 grand jury.

The Court: They will be marked D.

Mr. Margolis: And the questionnaires for the February 1946 petit jury as a separate exhibit.

Mr. Calverley: If the Court please, in connection with that I would like to ask the witness a few questions as to the foundation for the introduction of this exhibit, if I may.

The Court: Yes.

(Testimony of Edmund L. Smith.)

Voir Dire Examination

By Mr. Calverley:

Q. Mr. Smith, with reference to the questionnaires of petit jurors, do the list of questionnaires which have been handed to you by counsel include the names of all the petit jurors whose names were placed in the master box in February 1946?

A. They do not.

Q. What is the fact with reference to the questionnaires of the grand jurors, does that include all of the grand jurors whose names were placed in the master box?

A. They do not.

Q. Where are the rest of the questionnaires?

A. I have been unable to locate them, and the deputy who had charge of them has been unable to locate them. He stated that some were probably in the subsequent panels, but [62] I haven't located them.

Mr. Calverley: If the court please, we object to the introduction of the exhibit on the ground that it is incomplete.

That is all that is available, your Honor.

Mr. Calverley: There is no proper foundation laid.

The Court: They will be marked for identification, the grand jury as D, and the petit jury as E.

(The questionnaires referred to were marked for identification as Defendants' Exhibits D and E respectively.)

(Testimony of Edmund L. Smith.)

The Court: Just by way of observation, I am thinking that your challenge goes not to this particular grand jury, the 23 men, or to the particular panel of trial jurors, but it goes to the method of selecting all that went in the box.

Mr. Margolis: That is correct, your Honor.

The Court: For both of them.

Mr. Margolis: That is correct. And I want to say this, that obviously if we had the names or questionnaires for all of the jurors, or prospective jurors whose names went into the box, our records would be more complete. But we intend to show by an expert on the subject that if there had been 1000, or any other number in the box, and if the names were chosen by chance from that box generally the same pattern would be followed and the names chosen by chance from those in the box would be the same as was the pattern of all the names in the box, that there would be some variation but that the variation [63] as compared with the variation from the census figures on population would be very, very small, and that from these records alone the method of selection which results in discrimination can be scientifically established. We intend to show that by an expert witness, your Honor.

Now if we have all of the questionnaires we would produce exhibits based upon all of the questionnaires. The lack of other questionnaires is not due to any fault of the defendants. The defendants have obtained everything that was available and are mak-

(Testimony of Edmund L. Smith.)

ing the most complete study that is possible upon the basis of what is available. I think that scientifically it is sufficient so that a conclusion with regard to whether the system is one which results in discrimination or is not one which results in discrimination can be drawn with reasonable certainty.

The Court: Have you made a search for the questionnaires?

The Witness: Yes.

The Court: Have you been able to find them?

The Witness: We have been unable to find them.

The Court: Have you the record of the total names that went in the master box at that time?

The Witness: There is no way of ascertaining now at this date, and under the system that I have of limited clerical help, exactly the names which were——

The Court: The total number? [64]

The Witness: That were on the total number of names.

The Court: The total number of names that were in the box from which both the grand jury and the petit jury for the 1946 term were drawn?

The Witness: As I recollect, there was 637 names in the box. That was all the questionnaires and cards and tickets that we were able to check at that time.

The Court: Now how many of those were drawn? There were 50 drawn for the February grand jury. How many of those were drawn throughout the rest of the term for the petit jurors?

(Testimony of Edmund L. Smith.)

The Witness: I believe there was 150 each of the two petit jury venires.

The Court: Of 350 drawn out of the 600?

The Witness: That is correct.

The Court: What happened to the rest of them? What happened to the other names at the beginning of the September term?

The Witness: There were 287 names left.

The Court: At the beginning of the September term?

The Witness: In July the 1st of July, the commissioner and I placed I believe 130 names more in the box in order to draw the September term panels.

The Court: 150 more?

The Witness: 130 more.

The Court: Very well. How many questionnaires are here [65] in the exhibit? There are 23 grand jurors and how many petit jurors, do you know?

The Witness: I haven't counted them.

Mr. Margolis: I would like at this time, your Honor, to renew my offer of those questionnaires into evidence.

The Court: I will just leave them marked for identification at the present time and reserve ruling on the offer.

Do you want to use these now?

Mr. Margolis: I want to ask some questions with regard to them.

(Testimony of Edmund L. Smith.)

Direct Examination

(Continued)

By Mr. Margolis:

Q. Now the questionnaires for the grand jury which are marked Defendants' Exhibit D include only those who were actually selected to serve, is that correct? A. That is correct.

Q. The questionnaires for the petit jurors, marked Defendants' Exhibit E, include those who were excused, is that not so?

A. I didn't understand that. I thought those were only the petit jurors who were impaneled.

Q. We want to check that. Will you check that?

The Court: How can you check it?

The Witness: None of them appear to have the mark of the judge on them excusing them. [66]

Mr. Margolis: I see.

Q. You would conclude then that both of those sets of questionnaires, Exhibits D and E, are, first, the grand jury which served and, second, the petit jury which was actually sworn in as a panel?

A. That is correct.

Q. Now you also have questionnaires for the petit jury, for the grand jury, both the panel and those who served and were sworn in in September 1946, and for a panel of trial jurors in September 1946, do you not? A. That is correct.

Q. Do you have those questionnaires here?

A. Not here. They are in my office.

Los Angeles, California; February 18, 1947;
2:00 o'Clock P.M.

* * *

EDMUND L. SMITH

the witness on the stand at the time of recess resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Margolis:

Q. Mr. Smith, you now have before you the various questionnaires referred to this morning?

A. I have the questionnaires of the 855 names that were in the box, put in the box by the jury commissioner and I on January 2nd of this year.

Q. Do you also have the questionnaires for the September 1946 petit jury?

A. Those questionnaires, I don't know that all of them are here. These are panels. I believe there is the grand [69] jury panel that was drawn.

Q. You have the September 1946 term grand jury panel, is that right? A. Yes.

Q. That includes all of those 50 names who were drawn out of the jury box and from which, after excuses were granted, as testified to by you, the September 1946 grand jury was drawn, is that correct?

The Court: Of 23 members.

Mr. Margolis: Of 23 members; yes.

(Testimony of Edmund L. Smith.)

The Witness: I haven't checked them. I assume they are all there.

Q. (By Mr. Margolis): Incidentally, these are the questionnaires which you also turned over to persons from my office and to myself in connection with the studies, is that right?

A. That is correct.

Q. Our information showed that there were 49 questionnaires here. Is it possible that only 49 names were drawn?

A. It may be that one of those names excused was put—no, that is September. It may have been put in the present box.

Q. That would account for only 49 instead of 50 names?

A. I say that is a possibility. I am not sure. I haven't checked that.

Mr. Margolis: At this time, if your Honor please, I [70] would like to offer in evidence as defendants' next in order the questionnaires for the grand jury September 1946 term panel.

The Court: It will be marked F for identification.

(The questionnaires referred to were marked Defendants' Exhibit F for identification.)

Mr. Calverley: Same objection, your Honor. This proceeding is directed to the February 1946 grand jury, not the September 1946 grand jury.

(Testimony of Edmund L. Smith.)

The Court: That objection is overruled. Exhibit F is in evidence.

(The questionnaires referred to were received in evidence and marked Defendants' Exhibit F.)

Q. (By Mr. Margolis): Now you have here questionnaires, a group of questionnaires which are labeled "jurors September 1946 term". Will you please tell us what questionnaires those are?

A. I believe these are the questionnaires of those names of petit jurors who were drawn out of the box for whom a venire was issued to the Marshal returnable at the September term.

Q. In other words, that would include, would it not, all of the persons whose names were drawn from the box some of whom were later impaneled and some of whom were excused by the Court, is that correct?

A. I haven't checked them, but I assume that that is correct.

Q. Do you want to take a look at them?

A. That would take some time.

Q. As a matter of fact, there are more questionnaires there than there are jurors who were impaneled for the September [72] 1946 trial jury, isn't that so?

A. Yes, there are more apparently.

Q. So it would include jurors who were excused, is that not so?

A. Yes. I wouldn't say that all of them that

(Testimony of Edmund L. Smith.)

were excused are there. There were 350 petit jurors drawn for the September term, drawn on July 1st.

Q. Do you have any other questionnaires for the September 1946 term for the trial jury?

A. There may have been other questionnaires. A few of them may be in here.

Q. When you say "in here," what do you mean?

A. In this category of the present 855 that were placed in the box January 2nd of this year.

Q. Now, then, as far as you have been able to locate them, the questionnaires which we have referred to and which are labeled "jurors September 1946 term." are all of the questionnaires you have been able to locate of the panel, trial jury panel, selected for that term, is that correct?

A. That is correct.

Q. Now if any questionnaires were removed from the questionnaires covering the entire panel, they were not removed on the basis of the occupation of the persons whose questionnaires were removed, is that right?

A. The clerk has not removed them except that the judge [73] may have ordered them excused permanently or otherwise, and under the direction of the Court then those questionnaires would be disregarded and not used again. If for instance, a prospective juror was disqualified or not competent or was excused for any other reason as ill health or not in possession of his faculties, or for

(Testimony of Edmund L. Smith.)

other cause by the Court, then they would not be used. But the clerk of jury commissioner would not disregard a questionnaire for reasons of occupation except, speaking for myself and not for the jury commissioner, I have, where it came to my attention and we were dropping names in the box, if a name appeared to me of a practicing attorney that I knew, why I would exclude his name. But nevertheless some practicing attorneys have been placed in the box.

Q. Then as far as you are concerned, no names have been, or no questionnaires have been, removed from the group of questionnaires that we are talking about except perhaps some practicing attorneys, is that right?

The Court: On account of occupation?

Mr. Margolis: On account of occupation; yes.

The Witness: That is correct.

Mr. Margolis: At this time, if your Honor please, I would like to offer the group of questionnaires labeled "jurors September 1946 term" as defendants' exhibit next in order.

The Court: If there is no objection it will be received in evidence. [74]

The Clerk: G.

(The group of questionnaires referred to were received in evidence and marked Defendants' Exhibit G.)

Q. (By Mr. Margolis): Now, Mr. Smith, I see you have a number of files or bunches of question-

(Testimony of Edmund L. Smith.)

naires. Are these questionnaires all of the questionnaires for the jurors who were put in the box for 1947, in the master box for 1947, as you have previously testified?

The Court: In January.

The Witness: I am told by the calendar clerk that these are all of the questionnaires which I gave him after the drawing of the panel.

The Court: Wait, now. After the drawing of the panel? Does that mean that if they are all there that those are the questionnaires for the 800 names that were put in the January box from which both the February 1947 grand jury and February 1947 petit juries were drawn?

The Witness: That is correct.

Q. (By Mr. Margolis): Is there any distinction between the questionnaires on any basis whatsoever, according to the manner in which they are fastened together or the groups in which they are fastened together?

A. The calendar clerk has his own system on this. [75]

This is the grand jury as drawn and the grand jurors excused.

Q. I see. We have here a group of questionnaires headed "grand jury February 1947 term" and then below them "grand jurors excused." Now am I correct in stating that all of these names were put into the box, into the master box, in January of 1947 and then were drawn from that box for the February 1947 grand jury and that these ques-

(Testimony of Edmund L. Smith.)

tionnaires represent, the February 1947 grand jury term represents, those who actually served and the grand jurors excused represent those who were drawn in the panel but who were excused from service on the grand jury?

A. That is correct.

The Court: In other words, the long and short of it is that those were the questionnaires for the veniremen?

The Witness: Yes.

Q. (By Mr. Margolis): And they make up part of the 850 names that you have referred to?

A. That is correct.

The Court: They were taken from the 850, is that correct?

The Witness: That is correct.

The Court: How many are there, do you know?

Mr. Margolis: I think there are 50, your Honor.

I would like to offer these in evidence as defendants' exhibit next in order, your Honor.

The Clerk: H.

The Court: In evidence.

(The questionnaires referred to were received in evidence and marked Defendants' Exhibit H.)

Q. (By Mr. Margolis): Now do you have a separate group for those who were selected and were impaneled on February 3, 1947?

The Court: That is petit jurors?

Mr. Margolis: As petit jurors; yes.

(Testimony of Edmund L. Smith.)

The Witness: These are the petit jurors of February 3, 1947.

Q. (By Mr. Margolis): You have handed me a group of questionnaires bearing a card labeled "petit jurors February 1947, Ret."—return, I guess that is. A. Returnable.

Q. "Returnable 2/3/4, 9:30 a.m."

The Court: That is the venire, is that correct, or is that the panel?

The Witness: That I don't know. He hasn't got it labeled. Apparently there were some in here that were excused, so it must include the venire, 200. That would be 200 if it includes all. [77]

Q. (By Mr. Margolis): And these were selected out of the master box and out of the group of 850 were placed in the master box January 1947? A. 855.

Q. 855? A. Yes.

Q. All right.

I will offer this group of questionnaires labeled "petit jury February 1947, returnable 2/3/47, 9:30 a.m.," as defendants' exhibit next in order.

The Court: I in evidence.

(The questionnaires referred to were received in evidence and marked Defendants' Exhibit I.)

Q. (By Mr. Margolis): Now, do you have the questionnaires for those jurors who were summoned to appear on February 17, 1947 as trial jurors?

(Testimony of Edmund L. Smith.)

The Court: That is the venire?

Mr. Margolis: The venire; yes.

The Witness: Yes.

Q. (By Mr. Margolis): I see here a group of questionnaires for petit jurors summoned to appear 2/17/47, 9:30, A to H inclusive. Does that indicate that those are the questionnaires for the jurors [78] whose last names begin with the letters A to H inclusive who were summoned to appear on February 7, 1947 to serve as trial jurors?

A. That is correct.

Q. Do you have the rest of them?

A. The rest of the alphabet is here.

Q. There are no labels?

A. Yes, it is marked here.

Q. I see. Up in the upper left-hand corner of the first questionnaire is written in blue pencil the word "petit, 2/17/47"? A. That is correct.

Q. And those are the balance alphabetically of the questionnaires for the jurors summoned to appear on February 17, 1947?

A. That is correct.

Q. The first name on the second group is Byron Everett Ingrahm, is that correct?

A. That is correct.

Q. And all of these names were likewise drawn from the 855 names which were placed in the master box of January of 1947?

A. That is correct.

(Testimony of Edmund L. Smith.)

Mr. Margolis: This exhibit, which is in two parts, perhaps it should be madked J-1 and J-2, your Honor. [79]

The Court: All right.

(The questionnaires referred to were received in evidence and marked Defendants' Exhibits J-1 and J-2 respectively.)

Q. (By Mr. Margolis): Now you have some questionnaires left. Can you tell us what those are?

A. All of these questionnaires I believe are the balance of the 855 who were excused or otherwise have not been segregated, excused and no appearance. In other words, either the summons didn't reach them, there was no service, or they were excused for various reasons by the Court.

Mr. Margolis: I think we had better start over again.

Q. I have one group here of questionnaires, the first one of which is for Norman J. Adams. Could you tell me what that group of questionnaires represents?

A. That group and this group represent the balance of the 855 which have not heretofore been introduced.

Q. Could you explain why they are broken up into three sections?

A. Apparently these are the excused.

Q. And when you say "these"?

A. This category.

(Testimony of Edmund L. Smith.)

Q. Before we go on, what about the category, the first of the questionnaires of which is Norman J. Adams? Are those the ones that are still in the box? [80]

A. I don't know. One of them here has been excused to May 6th. Some of these questionnaires I don't believe have been segregated.

Q. Segregated for what purpose, Mr. Smith?

A. For the purposes of the jurors who have been excused and some who have been impaneled. I would have to learn that from the calendar clerk. He is the one that separated them.

Q. In any event, if we take these remaining three groups of questionnaires then we will have, together with the questionnaires which have been introduced in evidence as Defendants' Exhibits F to J-2 inclusive, all of the 850 who were put in the master jury box in January 1947?

A. That is correct, so far as I am informed. I haven't checked them myself.

Mr. Margolis: At this point, then, your Honor, I would like to offer as K-1, 2 and 3 the three groups of questionnaires just referred to.

The Court: Admitted.

(The questionnaires referred to were received in evidence and marked Defendants' Exhibits K-1, K-2 and K-3.)

Q. (By Mr. Margolis): Mr. Smith, although you did not have questionnaires for the balance of the February 1946 jury panel, that is, other than

(Testimony of Edmund L. Smith.)

those who actually became grand jurors, the cards [81] which are in evidence as Exhibit C do give the names of the entire February 1946 grand jury panel, is that not so?

A. That is correct, and the addresses.

Q. Names and addresses? A. Yes.

The Court: The panel or only the 23 of the grand jury?

Mr. Margolis: The panel.

The Court: The 50?

Mr. Margolis: That is right. We have questionnaires for those who served, we have cards for the entire panel including those who served and those who did not. The cards are in evidence as Exhibit C.

Q. Now, Mr. Smith, those questionnaires which are in evidence up to this point, and the cards which are in evidence up to this point, are the questionnaires and the cards which you turned over to myself and to persons from the office of attorneys for the defendants and from which they obtained data, is that right? A. That is true.

Q. Now our records show, Mr. Smith, that for the September 1946 grand jury there are a total of 23 questionnaires, to wit, the total of one for each member of the grand jury, but that there are only 20 questionnaires in the file of those excused, or those who were not excluded from the September 1946 grand jury. Can you account for the absence of seven questionnaires? [82]

A. Only by surmise or guess.

(Testimony of Edmund L. Smith.)

Q. Assuming that there were some qualified jurors who were not excused and who were placed in the box finally from which the 23 names were drawn, is it possible that those persons who were not drawn but who were otherwise qualified and not excused were then placed into some other panel?

A. That is correct.

Q. Then their questionnaires would be elsewhere?

A. That is correct.

Q. And that would account for having less than 50 questionnaires for the panel, is that right?

A. That is correct.

Q. Now, Mr. Smith, on your overall summary of the number of questionnaires of jurors that were put in the box January 1947, that gives us 820 new names instead of 855. Can you account of a discrepancy of 33 names?

A. No, I cannot because there was a questionnaire for each card. The cards were made from the questionnaires returned.

Q. Well, I notice that you have several small groups of questionnaires here. Is it possible that a small bunch of 33 questionnaires may have been misplaced?

A. That may be. When I turn them over to the calendar clerk I pay no more attention to them.

Q. Now, Mr. Smith, you mentioned about 25,000 to 30,000 cards that you have in your file of persons who had been selected at one time or another for service as prospective trial jurors or grand jurors, some of whom had served and some of whom

(Testimony of Edmund L. Smith.)

had not served. Do you recall your testimony on that? A. Yes.

Q. Do your 25,000 or 30,000 cards include jurors or prospective jurors who have been excused in the past? A. They do.

The Court: All of them or just some of them?

The Witness: Some of them.

Q. (By Mr. Margolis): How is it determined when a juror or a prospective juror is excused whether his card shall be kept in with that 25,000 or 30,000 or shall be excluded therefrom?

A. The judge determines that.

Q. Do you know on what basis? Do you know what the basis is for that determination?

A. Disqualification or incompetency is the only thing that I can think of.

Q. In other words, if a prospective juror is disqualified from service or is incompetent, as, for example, being deaf, his card would be taken out completely, is that right?

A. Yes. It should be put in what we call the leave-out box. Those cards are still retained. [84]

Q. But they are not included in the 25,000 or 30,000 you referred to? A. No.

The Court: Why do you retain those cards?

The Witness: It is just a habit for checking purposes.

The Court: That is to say, if a name is drawn again you would check that card and discover that he was permanently excused for incompetency or disqualified?

The Witness: Yes.

(Testimony of Edmund L. Smith.)

The Court: Or his name is suggested or proposed?

The Witness: His name which should come up again it would be checked with those cards.

The Court: The question you had before I don't think was answered. Those jurors who were excused and put back in the box, those were temporarily excused?

The Witness: That is correct.

The Court: And the others were permanently excused?

The Witness: Yes.

Q. (By Mr. Margolis): If a juror is excused because of hardship, would that name be put back in the 25,000 or 30,000 cards? A. Yes.

The Court: Why?

The Witness: For future use. The status of that juror may change. [85]

Q. (By Mr. Margolis): When were the names of the 25,000 or 30,000 names selected originally?

A. I notice some cards that went back to 1925.

The Court: Hasn't it been a continuous process since then?

The Witness: Yes, it has.

The Court: By your predecessor and by yourself?

The Witness: That is correct.

Q. (By Mr. Margolis): Is it true that each year cards are added to this group of 25,000 or 30,000 cards? A. That is correct.

Q. And that has gone on since 1925?

A. Before that.

(Testimony of Edmund L. Smith.)

Q. Since before that? A. Yes.

The Court: Cards are added and cards are taken out?

The Witness: Yes.

The Court: After you discover their disqualification, incompetency, death or removal from the district?

The Witness: Yes.

The Court: Where do those names come from? That isn't quite clear to me. Are those all names that were there and that you, as the clerk, have added or does the jury commissioner [86] add to them?

The Witness: The various clerks, three clerks including myself, my two predecessors, myself and the various jury commissioners. Those cards are compiled from the list made up by them and myself over the years.

The Court: Now when the jury commissioner has names to add to the list, does he add them just before you make up your master box or does he add them from time?

The Witness: From time to time he brings me in lists.

The Court: It is a continuing process throughout the year?

The Witness: Yes.

The Court: And he gives you the list of names and what happens to that list of names?

(Testimony of Edmund L. Smith.)

The Witness: As I stated in my previous testimony, the list is given to a clerk who puts the zone numbers on it.

The Court: You mean you give it to one of your clerks?

The Witness: One of the clerks, a clerical assistant or a deputy, who places the mailing zone number after the name.

The Court: Pardon me. You described that procedure. Let us call that processing a name. In short, when he hands you a list of new names, and I understand he does from time to time throughout the year, those names are processed and eventuate now in a questionnaire and a card in this file of 25,000 or 30,000?

The Witness: That is correct.

The Court: How do you file those in the 25,000 or 30,000, alphabetically or according to counties or according to any other classification, occupation, previous condition or servitude, or how?

The Witness: Alphabetically only.

The Court: By sex?

The Witness: No. After the cards are used and go into that available box there is not distinguishment of sex, except some of them are marked "F" for female, I believe, for purposes of mailing or correspondence.

The Court: As the card is there with their name not indicating whether it is Mrs. or what it is, and you mark "F" or "female" on there?

(Testimony of Edmund L. Smith.)

The Witness: Female, because we have had women jurors who at the time the list was given to me were Miss and unmarried, and by the time the questionnaire was returned why she had married, changed her name, so the card would have to be placed under a different alphabetical letter.

The Court: You started to put women into this master file from whence you drew the names for the master box when, I mean the names of women?

The Witness: The first names of women?

The Court: Yes.

The Witness: The first names of women were placed in [88] the box in the latter part of 1943 for the 1944 term.

The Court: How many, do you remember?

The Witness: Approximately 500 or so.

The Court: Were there men put in at the same time?

The Witness: At the same time.

The Court: How many men?

The Witness: I don't remember.

The Court: Do you have any way of knowing what percentage or proportion of the 25,000 or 30,000 names in these drawers are women?

The Witness: No, I have no way, not without counting them.

Q. (By Mr. Margolis): On that point, Mr. Smith, the women have only been added for several years, is that right?

A. Since, as I say, in 1943, the latter part of 1943.

(Testimony of Edmund L. Smith.)

Q. So up until the latter part of 1943, would it be fair to say that more than 80 per cent of the total cards now, which you now have already there, which you had already accumulated, that more than 80 per cent of the total cards which you now have are men?

The Court: Let's ask him if he knows how many cards in the box now have been put there since—when was this, 1940?

The Witness: 1943.

The Court: In February? [89]

The Witness: November or December of 1943.

The Court: Do you know how many cards have gone into that box, regardless of the number that have been taken out since then, since November 1943?

The Witness: No, because when a juror is excused for incompetency or permanently excused by the judge, or deceased or otherwise, it is marked "L. O.," leave-out. Those cards go into the leave-out category drawers. The others ultimately, when the clerk gets time to put them back in their alphabetical order, with a notation of the date excused.

The Court: I don't understand that. What others?

The Witness: The remainder.

The Court: The remainder of what? The remainder of those excused?

The Witness: Yes, who are not permanently excused for incompetence or otherwise permanently excused or deceased or moved out of the country,

(Testimony of Edmund L. Smith.)

other than those the remainder of the cards excused and those who have served up to that time go back into that box.

The Court: You have another drawer or box, do you not, of jurors who have served currently so that the qualification is observed that a person shall not serve as a juror who has served within one year. Do you have a one-year box or something like that, a two-year box?

The Witness: No, except that I have been trying to inaugurate a system of cards and names of prospective jurors to whom have been mailed questionnaires and who have been drawn. I have been starting a new alphabetical list with recent jurors who have served, in other words, going through the 25,000 or 30000 starting another alphabet as they come in.

The Court: You mean you are starting a new master drawer?

The Witness: Available drawer.

The Court: Available drawer?

The Witness: Yes.

The Court: To supplant the 25,000 or 30,000 you now have?

The Witness: Yes.

The Court: And those are made up from the ones who have served?

The Witness: Served or excused.

The Court: Served or temporarily excused and not permanently excused?

The Witness: That is correct.

(Testimony of Edmund L. Smith.)

The Court: So that your present system will eliminate the 25,000 or 30,000 drawer you now have and eventuate in another drawer of available names of men and women?

The Witness: That is correct.

Q. (By Mr. Margolis): Mr. Smith, you say you are starting this new system. [91] As of when are you starting it?

A. I believe those cards do not go back of '45 or '44.

Q. When are you putting this new system into effect of disregarding the 25,000 to 30,000 cards?

The Court: When did you start your new available drawer that you were just mentioning?

The Witness: Approximately a year ago, if I remember correctly.

Q. (By Mr. Margolis): Then when you were testifying about selecting names from these 25,000 or 30,000 cards you mean you don't do that any more?

The Court: I understood he does that but after a person has served on a jury they are exempt for a year, they are disqualified for a year so he has to have some drawer to keep them in for a year, so instead of keeping them for a year he is starting a new available drawer.

The Witness: That is correct. We don't use jurors who have served for three or four or five years.

Q. (By Mr. Margolis): However, you are still using the 25,000 or 30,000 cards?

A. That is correct.

(Testimony of Edmund L. Smith.)

Q. And if a person's name once gets in there that name stays in there until you learn that the person has become incompetent or has died or has left the district, is that right?

A. That is correct.

The Court: Or otherwise permanently excused?

The Witness: That is correct.

Q. (By Mr. Margolis): The accumulation up to 1943 consisted of exclusively men, is that right?

A. Yes. There were women occasionally who appeared but were excused.

Q. And you wouldn't have a card for them?

The Court: You mean there were women who appeared before that?

The Witness: Yes, by similarity of names, like Frances. It might be spelled "c-i-s" and "c-e-s." Those names were put in the box, you might say, in error.

Q. (By Mr. Margolis): Then the card would be thrown out? A. Yes.

Q. So that your accumulation of cards prior to 1943 consisted exclusively of men, is that correct?

A. That is correct.

Q. And since 1943 would you say you had about 50 per cent men and 50 per cent women?

A. Oh, no. Women are added each term during the year but some of the men will be drawn out of this available 25,000 [93] or 30,000 cards.

Q. I don't quite understand what you mean by saying that the women are added each term. Aren't women's cards placed in with the men's cards now?

(Testimony of Edmund L. Smith.)

A. Yes, but when you consider that, as I just stated, we do not use jurors who have served within the last three or four or five years notwithstanding that they would be competent if they had served over one year, but we would go back so as to not burden those people within three, four or five years.

Q. I understand that, Mr. Smith.

The Court: What he is trying to get at is this: Of the names that have gone into the box since you have started putting women in, have the new names been half women and half men or what?

The Witness: There is no set proportion. It is according to how the questionnaires come back and how many names we have available at the time.

Q. (By Mr. Margolis): There has been no definite attempt to get more men than women or more women than men since 1943?

A. No, but the jury commissioner has furnished most of the names of the women, and when I get that list I will supplement that with the men's names out of the various cards.

The Court: From that what do you do, that is, where you make up the 800?

The Witness: That is where we send out the questionnaires.

Q. (By Mr. Margolis): Maybe we can get at it quite clearly this way. I would like to have you tell me, beginning from the very start of the process, how the 855 names were selected, from what sources and by whom, which were put into the master jury box in January of 1947.

(Testimony of Edmund L. Smith.)

A. The jury commissioner and the clerk placed the names in the box, as I have stated, from a list furnished by the jury commissioner of women and perhaps some men selected at random from the 25,000 or 30,000. All of these to whom were sent questionnaires——

The Court: I am a little confused, Mr. Smith. I had understood a while ago that when the jury commissioner hands you a list of names those names are processed and eventuate in a questionnaire and a card in your available box and that when you go to draw the 800, or whatever number it is, all that 800 are drawn by you and the commissioner from the available box at random?

The Witness: No, that is a misunderstanding. I didn't say that.

The Court: Well, I had understood that this morning and this afternoon. Will you straighten me out on that?

Mr. Margolis: I wonder if we could take it step by step.

The Court: Very well.

Q. (By Mr. Margolis): You receive an order by the senior judge to place 500 or more names into the master box in accordance with Exhibit A or a similar order? A. Yes.

Q. What is the first thing that you and the jury commissioner do after receiving that order, and trace step by step what you do in order to finally get those names into the master box?

A. I will have to go back of the order because the names are processed prior to that order.

(Testimony of Edmund L. Smith.)

Q. Then go back as far as you think is necessary and give us step by step how those names got into the box.

A. The jury commissioner will give me a list and, as I say, he has furnished practically all of the women in greater percentage, and questionnaires are sent to those.

Q. And men who may be on the list?

A. Possibly. But I will supplement that with names drawn from this available box of men. I haven't come to the stage yet of going back and taking women out of that box because it is such a short period.

Q. Because you didn't start using women until 1943 and you don't put them in there for five years?

A. That is correct.

Q. Now if you don't mind my interrupting you, so we [96] can get the details as we go along, when you get a list from the jury commissioner is there any specified number on that list?

A. No.

Q. Just a list that he gives you?

A. Yes.

Q. Is there any specified time when he gives you the list?

A. No.

Q. Just from time to time he will give you a list, is that right?

A. Yes, that is correct.

Q. Now let's assume that he gives you a list of 200. Does he sometimes give you a list of that many?

A. Or a thousand.

Q. All right. He gives you a list of a thousand. How many names will you then draw from the

(Testimony of Edmund L. Smith.)

25,000 to 30,000 cards to supplement the list of a thousand which he has given you?

A. If he has a thousand women I would perhaps draw an approximate number of men to send questionnaires to.

Q. Do you send questionnaires each time that you send out questionnaires, do 50 per cent of the questionnaires go to women and 50 per cent to men?

A. Oh, no.

Q. You receive the questionnaire—you receive the [97] list from him. You see that it has so many women and so many men. Say it has 900 women and 100 men.

The Court: Pardon me, counsel. Have you one of the lists that the jury commissioner has given you?

The Witness: I may have filed one of them. We don't use the list after we receive questionnaires.

* * *

Q. (By Mr. Margolis): Mr. Smith, I understand that you have some corrections to make with regard to the exhibits, the questionnaires that were introduced as exhibits earlier this afternoon.

A. I have learned that the category of questionnaires [98] marked Defendants' Exhibit K-3 are the questionnaires of jurors actually and heretofore impaneled and now subject to call in service at the present time.

Q. That would include those who were impaneled on February 3rd and those who were impaneled on February 17th?

A. That is correct.

(Testimony of Edmund L. Smith.)

Q. Now it is true, however, is it not, Mr. Smith, that at the time that these questionnaires were turned over to myself or the people from my office for study, you had a separate list for grand jurors summoned—trial jurors, I should say, summoned to appear on February 17, 1947, and these two lists of February 3 and February 17 panels have not yet been combined?

A. Yes. These are the ones that are impaneled.

The Court: I understood that the tickets are combined and are in your drawing box now.

The Witness: That is correct.

Q. (By Mr. Margolis): There were a group of jurors impaneled on February 17, 1947. That is this last one?

A. Yes. And they were not segregated at the time you had them.

Q. At the time we had them there was a group of questionnaires which were headed "summoned to appear on February 17, 1947," isn't that so?

A. That I didn't see.

Q. Mr. Hansen would know about that?

A. Yes.

Q. In any event, since yesterday the arrangement of the questionnaires has been changed because you have had a group of jurors impaneled yesterday?

A. That is correct.

Q. Are there any corrections to be made with regard to K-1 and K-2, Mr. Smith?

A. Not corrections. Those are excused and, as I stated before, those excused and not appearing for some reason.

(Testimony of Edmund L. Smith.)

Q. Which is K-1?

A. K-1 appears to be those that are already excused and some who did not respond to the summons.

Q. The same is true of K-2?

A. K-2 appears to be those who are excused.

Q. Now you have brought in four additional bundles of questionnaires, the first of which is headed "alphabetical list, women questionnaires, women in alphabetical order A to Z inclusive," the second of which is headed "men, A to H inclusive," and the third "men, I to O inclusive," and the fourth "men, P to Z inclusive." Can you tell what those are?

A. Those are the questionnaires of prospective jurors remaining in the master box.

Q. That is the balance of the 855 placed in the master [100] box in January 1947 who have not been drawn out for one of these panels?

A. That is correct.

Mr. Margolis: I offer that in evidence, if your Honor please.

The Court: Put them all in one batch. Are the 250 taken out? You said you were calling 250 for March 1st. Have you sent that venire to the Marshal yet?

The Witness: That venire has gone to the Marshal.

The Court: Are those 250 in there?

The Witness: Yes. They haven't been segregated.

(Testimony of Edmund L. Smith.)

The Court: They will be marked L-1, 2, 3 and 4 in evidence.

(The questionnaires referred to were received in evidence and marked Defendants' Exhibits L-1, L-2, L-3 and L-4.)

Q. (By Mr. Margolis): Now, did you find a list of proposed jurors which have been submitted to you by Mr. Hansen?

A. By Mr. Brown you mean?

Q. By Mr. Brown. Excuse me.

A. Yes. I found at haphazard a few.

Q. You have handed me three lists, the first one of which appears to have 69 names and it says "questionnaires mailed 11/8/45." Does that indicate to you that the list was given to you shortly before 11/8/45? [101] A. Yes, it does.

Q. I notice that this list of 69 is composed entirely of women.

A. I found one man. There is a man who lives at the Jonathan Club. That is what called my attention to it. I wondered how a woman could be at the Jonathan club.

Q. So there are 68 women and one man on that list submitted to you by Mr. Brown on November 8, 1945? A. Sometime prior to that.

Q. Yes.

The Court: Sometime, meaning shortly?

The Witness: Well, it might have been a month or two.

Q. (By Mr. Margolis): When you received that particular list——

(Testimony of Edmund L. Smith.)

I think it might be well, your Honor, to have this marked so we will know what we are referring to. I will offer this list, which is headed "questionnaires mailed 11/8/45," with 69 names on it as Defendants' exhibit next in order.

The Clerk: M.

The Court: In evidence.

(The questionnaires referred to were received in evidence and marked Defendants' Exhibit M.)

Q. (By Mr. Margolis): Now, referring to Defendants' Exhibit M, which you received within a month or two of November 8, 1945, when [102] you received that Exhibit M what did you do with it?

A. Handed it to a clerk for the typing of envelopes—first to mark the mailing zone numbers after the addresses, and then to type up envelopes for mailing questionnaires.

Q. At the time those questionnaires were mailed on November 8, 1945, as shown by Exhibit M, were other questionnaires mailed out to other persons also?

A. There undoubtedly were but I can't say how many, or when they were mailed.

Q. Referring now to your practice, if you received a list, let us say, such as this of 69 persons from Mr. Brown, you would then go to the 25,000 or 30,000 cards that you have and select a number of names from those cards, is that correct?

(Testimony of Edmund L. Smith.)

A. Yes. I might have had them already segregated, the names that hadn't served at that time since 1940 or '41.

The Court: An equivalent number?

The Witness: No, for mailing out questionnaires. We never count them except by—as I remember, during that time we had mailed approximately 6000 questionnaires.

The Court: During what time?

The Witness: The year prior to November 1945.

Q. (By Mr. Margolis): You mean over the course of that year? A. Yes. [103]

Q. Was there any system at all followed with regard to the number of names that you had obtained from the cards when you received the list from Mr. Brown?

A. No other than the names that had been selected of those who have not served, as I stated, since approximately 1940.

Q. I understand that, but I mean, was there any way of balancing off the two lists, would you take less of one or more of the other, or was it just simply absolutely at random?

A. It was at random in mailing out the questionnaires and also when the questionnaires are returned it becomes a matter of clerical work and just how many women get processed for the time to put the names in the boxes. We have a limit on getting the venires to the Marshal within at least a month or so prior to the return dates.

(Testimony of Edmund L. Smith.)

Q. Maybe we can get at it this way: Do you know how many questionnaires were mailed out during the year 1946? A. No, I do not.

Q. Do you have any record which would indicate that? A. No record.

The Court: Mr. Clerk, these 855 names that are in this master box now are on tickets, aren't they?

The Witness: That is correct.

The Court: And they are typed on a ticket, aren't they?

The Witness: That is correct. [104]

The Court: They were typed there by somebody from some card or list?

The Witness: From a card.

The Court: From a card?

The Witness: Yes.

The Court: Where did those cards come from, did they come out of that available box of 25,000 or 30,000?

The Witness: Some of them.

The Court: Where did the others come from?

The Witness: From the list furnished by the jury commissioner.

The Court: Doesn't the jury commissioner's list get into that available box?

The Witness: Well, the questionnaires that are returned from that list, the cards are made up.

The Court: Then they go into the box?

The Witness: Yes, but cards are not made up when they are mailed out from those lists, not until the questionnaires are returned.

(Testimony of Edmund L. Smith.)

The Court: I understand that. Forget all about the questionnaire. Somebody typed those little tickets in that box and they typed them from cards?

The Witness: That is correct.

The Court: Where did the cards come from physically? Where were they taken from? [105]

The Witness: Some from the lists, questionnaires and lists that the jury commissioner furnished.

The Court: No, no. That is where you made the cards up from, isn't it?

The Witness: Yes.

The Court: But where did the cards come from?

The Witness: Out of the available box, some of them.

The Court: Where did the rest of them come from?

The Witness: I take those out—the cards that are already made out which are taken out of the available box, of course there is no necessity, the questionnaires are matched up with that card, then the remaining questionnaires we have to type cards from and those are the names submitted by the jury commissioner, new names submitted by the jury commissioner.

The Court: Then the 855 names that went into that master box did not come out of your available box?

The Witness: Some of them.

The Court: Some of them did?

The Witness: Yes.

(Testimony of Edmund L. Smith.)

The Court: And the others came from these lists without going through the available box?

The Witness: That is right.

The Court: Where do you keep the cards? When did you put those cards in the available box? [106]

The Witness: After they are used the names are placed in the box. Then I have a drawer of these cards that match the tickets in the master box. This is put into the box, the names that are in the box matched with the tickets in the box.

The Court: You have a packet of cards in your hands. What are those, the 855 cards?

The Witness: No, these are petit jury venires drawn for the February term of 1946.

The Court: I still want to get back to this other system and method that you now have. It is not clear to me.

This last list, 11/8/45, did all of those names go into the 855?

The Witness: No, I can't say that.

The Court: Where did they go?

The Witness: They couldn't have gone in here—only those from whom questionnaires were received.

The Court: From all those you received questionnaires from?

The Witness: Yes, and maybe some questionnaires are still out.

The Court: But all those you did get questionnaires back on, every one of those went into the master box forthwith?

(Testimony of Edmund L. Smith.)

The Witness: I can't say because it is never checked with this list. It never has been checked. We haven't got [107] the time.

The Court: The questionnaires are sent out and get back and then you make a card from the questionnaires, is that right?

The Witness: That is right.

The Court: But you don't put that card in the available box?

The Witness: Not physically; no.

The Court: That is the jury commissioner box, is it? Has he a separate list?

The Witness: No. We hold those out and make tickets from those cards.

The Court: Then you make tickets from the cards?

The Witness: Yes.

The Court: Then when did you draw the tickets? Do you draw up tickets or do you draw from the cards in the box?

The Witness: I make up the cards from the questionnaires, and make up the tickets from the cards.

The Court: All at the same time, I mean, in the process?

The Witness: One clerk might make the cards and another clerk might type the tickets.

The Court: Well, I mean it is all a continuous process?

The Witness: A continuous process.

(Testimony of Edmund L. Smith.)

The Court: So that when you get ready to fill the box with 855 names you have the tickets already made out?

The Witness: Yes, before I call the jury commissioner [108] down to come down and put the names in.

The Court: Then you don't actually pick the 855 from a card, you pick it from a ticket?

The Witness: A ticket placed in the box; yes.

The Court: Then you have 25,000 or 30,000 tickets?

The Witness: Cards. Tickets are made up from the cards.

The Court: How many tickets have you got?

The Witness: Well, there were 855 tickets placed in there, and that is all the tickets we had at that time. There were no other tickets except what was being used in the courts prior and during the January and December months of the September term.

The Court: You have two other lists there that the jury commissioner submitted?

The Witness: Yes.

The Court: When were they submitted?

The Witness: One of them was received December 16, 1945, and the other one was received August 23, 1946. These are just picked out at random. They are not all the lists of the names submitted during those years.

The Court: In this process of the physical act which you and the commissioner engage in when

(Testimony of Edmund L. Smith.)

you put in one name and he puts in one name, where do you get those from? Where did you pick them from, you? Did you pick those out of the available box?

The Witness: The cards or the tickets?

The Court: I don't know what you pick.

The Witness: The tickets are made from the cards.

The Court: I know, but those are not made until you find out the people you are going to put in the box?

The Witness: That is right.

The Court: All right.

The Witness: Then the tickets are compared.

The Court: Wait, now. You pick your card out of the available box, is that right?

The Witness: Some of them.

The Court: Where did you pick the rest of them?

The Witness: It is typed up from these questionnaires but we do not have cards on the lists of new names submitted by the jury commissioner.

The Court: Where did the commissioner pick his card from? Does he pick a card? Doesn't he put a name in the box?

The Witness: No, he doesn't pick a card. We abandon the cards when the tickets are made and prepared and we know that we have cards and questionnaires for these tickets that we are going to place in the box, and the commissioner will grab up a handful and I will grab up a handful.

(Testimony of Edmund L. Smith.)

The Court: Handful of what?

The Witness: Tickets with just the names on them. He [110] will put one name in and I will put in another name alternately until we put the 855 or whatever number it is.

The Court: Then you pick the 855 cards from which the tickets are made? You choose those cards, is that correct?

The Witness: It is done as I explained from the questionnaires.

The Court: No, no. Who chooses those names? Who made up the list of 855 names that finally went in that box?

The Witness: There wasn't any list made up. It was made up from the cards.

The Court: Then who decided what names were going to be on that 855 list of names?

The Witness: The jury commissioner and I.

The Court: When did you do it?

The Witness: December 20, 1946.

The Court: Did the two of you consult?

The Witness: On January 2, 1947.

The Court: Did the two of you consult on those names?

The Witness: Yes. That is when the questionnaires came in. We sat down together after I had the tickets and cards all made out and I said, "Here are the questionnaires, here are the cards and here are the tickets."

The Court: That is for 855 names?

The Witness: Yes.

(Testimony of Edmund L. Smith.)

The Court: Where did you get the 855 names? Did you [111] choose the 855 names? Can you lead me out of this, Mr. Calverley?

Mr. Calverley: If the Court please, I might interrupt and clear this up.

Q. Mr. Smith, in picking up the 855 names, is it true that you pick your name, the names that you submit from the cards that are in the available box, is that right?

The Court: I asked him that and he said some of them.

The Witness: Some of them.

Q. (By Mr. Calverley): Where did you get the rest of them, from the cards in the reserve files that are not in the available box but are in the reserve file, the 25,000 or 30,000 names?

A. From the cards made up from the questionnaires.

Q. Aren't those the ones that Mr. Brown submits, not your names but Mr. Brown's names, the ones that are on that list? A. Yes.

Q. In other words, when you say some of them you mean you get all of the names you submit from the cards from the available box, isn't that right?

A. Some of them. I have stated in my affidavit that I have handled this—I can't say exactly when—but of the names submitted by jurors who should be in that affidavit, by the way, who were excused or disqualified, when they come in [112] and say, "My wife is able to serve, she is qualified," we send her a questionnaire. He will leave her name and

(Testimony of Edmund L. Smith.)

address and I will send her a questionnaire. Then there are some colored people, Chinese——

Q. You get the names you submit for placement in the master box, you get those from the cards in the available box and from certain lists of your own, is that right? A. That is correct.

Q. And Mr. Brown submits a list of his own which is not in any box as yet?

A. That is correct.

Q. And then questionnaires come back from that list, and taking those names that Mr. Brown submits that have responded to the questionnaire and are qualified and from the cards that you draw from the available box and from your own list, and a combination of those they make up the 855, is that right?

A. That is right. The mechanics of doing that is when the questionnaires returned from all of these sources have lists and cards and the available box, which I select and which the jury commissioner selects, then those cards which I already have and are selected for names to be placed in the box, they are compared with the questionnaires which have been placed in alphabetical order, and when we run across a name the card is drawn out, that questionnaire is set aside [113] because we already have a card for that questionnaire, and when we get a questionnaire that we do not have any card already made up for, then those remaining cards are typed for them.

(Testimony of Edmund L. Smith.)

Q. Is it true that the names that Mr. Brown submits and who respond to the questionnaires, that they eventually get into the available box or the reserve file?

A. Yes, after they are used.

Q. After they are used they eventually get in there?

A. Yes. The first place these cards go, when the tickets are placed in the master box the cards go into the drawer marked "names in box."

Q. Then is it true that when you and Mr. Brown select these tickets alternately that you put in the box those tickets which include names that have been supplied by you from the cards in the available box, and from your own list and names supplied by Mr. Brown from his list who have responded to the questionnaire?

A. That is correct.

Mr. Calverley: That is all, your Honor.

Mr. Margolis: Shall I proceed, your Honor?

The Court: Well, I don't know. I still do not understand it.

Mr. Margolis: I have a little difficulty too, your Honor. [114]

The Court: Now let me see. Before recess you were going to go out and get the last list that Mr. Brown submitted.

The Witness: Well, I don't know whether it is the last list or not. You asked for some list.

The Court: You have a list there. Now I don't know yet when those get into the available box. You

(Testimony of Edmund L. Smith.)

say they get in after they are used. What do you mean after they are used?

The Witness: Where the questionnaires are returned from these lists, then from other sources.

The Court: Not from the other sources, just from this list.

The Witness: All right. These are new names. They are checked with the names in the box and in the available box for duplicates.

The Court: Then you make a card out from the questionnaire?

The Witness: The questionnaires are first arranged in alphabetical order, the ones that are received up to that time or that have been placed in alphabetical order. We only work with that bunch.

Then the cards are typed, as I indicated before, where there are no cards, or any names coming off of this list there would be a card typed up from the questionnaire.

The Court: Then where would the card go?

The Witness: It would be held in abeyance until the jury commissioner and I met and put the names in the box.

The Court: You put the names in the available box?

The Witness: Put the names in the master box.

The Court: In the master box?

The Witness: Yes. The only place where the jury commissioner and clerk place names is in the master box.

(Testimony of Edmund L. Smith.)

The Court: So that what you do is to perform the clerical processing of the names submitted by the commissioner?

The Witness: That is correct.

The Court: His cards and questionnaires are kept separately or just the cards from your cards?

The Witness: No. They are commingled in alphabetical order.

The Court: Commingled in alphabetical order?

The Witness: Before the tickets are typed.

The Court: Before the tickets are typed?

The Witness: That is right. There are no tickets for those cards, for none of them, because when we are through with the tickets during the term, until the end of the term, the tickets are discarded and new tickets are made up for all of the cards at each time the jury commissioner and the clerk place the names in the box.

The Court: So that the 855 names that were selected were names for the January jury—the 855 we are talking about now—were names half of them submitted by the commissioner [117] without regard to your available file and half of them by you, is that correct?

The Witness: I couldn't say that they were 50 and 50 per cent, or 20 and 80 per cent, or 40 and 60 per cent.

The Court: How do you explain the alternate depositing in the box of names?

The Witness: We sit down with the tickets, and, as I say, he puts half of the tickets in and I

(Testimony of Edmund L. Smith.)

put half of the tickets in no matter from what source, but if there is a name that comes up and the commissioner thinks it is deceased, or happens to be incompetent or otherwise, we will set it aside.

The Court: Now when is the determination made about the 855 names, by the order of the court?

The Witness: To place them in the box?

The Court: To draw 855 names. That is not decided until the court makes its order?

The Witness: No, the order reads, the exhibit here in the record reads, that the clerk and jury commissioner shall empty the box and place therein not less than 300 or 500 names.

The Court: Not less than 500 names of citizens?

The Witness: Yes.

The Court: Well, then, if I understand you correctly, you have no way of knowing, and there is no way of telling, of the 855 names in the box for the current term how many of [117] those names were originally submitted by the commissioner and how many of them were submitted by you through other sources?

The Witness: There is no way of telling.

Mr. Margolis: I wonder if I could ask a question along those lines?

Q. I notice on those lists furnished you by the commissioner, with almost no exceptions the names were those of women. There might be one exception in 100 or 200. That is right, isn't it?

A. Oh, no. Here is a list that is all men.

(Testimony of Edmund L. Smith.)

Q. He also submits lists of men to you?

A. Yes, from time to time. There are over a thousand there. They must have counted them when they ran them off.

The Court: Let me get another thing straight now. The cards made up on those lists submitted by him do not go into your so-called available drawer until after they have been put into a box and chosen on a panel, is that correct?

The Witness: That is correct; or excused.

The Court: I understand. So that there is no commingling in your available box of the names submitted by the commissioner and yourself until after the names submitted by him have served?

The Witness: That is right, on new names.

The Court: On new names?

The Witness: Yes. [118]

Q. (By Mr. Margolis): Mr. Smith, when was the last time that you picked a group of cards out of the 25,000 or 30,000 cards that you refer to?

A. Recently. I can't remember how long ago it has been.

Q. Within the last month or two? A. Yes.

Q. At that time how many cards did you pick out of those 25,000 or 30,000 cards?

A. I didn't get through the alphabet and I imagine that I am having prepared now for mailing perhaps, as near as I can recollect, between 1500 and 2000.

Q. And those were names selected by you in the last month or two? A. Yes.

(Testimony of Edmund L. Smith.)

Q. From 25,000 or 30,000 cards? A. Yes.

Q. Now how many times a year do you do that?

A. I couldn't say.

The Court: Several times?

The Witness: Might be.

Q. (By Mr. Margolis): Now when you mailed out these 1500 or 2000 questionnaires from cards out of the 25,000 or 30,000 cards, did you at the same time mail out cards from lists submitted to you by Mr. Brown? [119]

A. Approximately around the same time.

Q. How many did you mail out, how many questionnaires did you mail out for the list submitted by Mr. Brown at that time?

A. I don't know.

Q. Would you have that list? Could you tell us?

A. I couldn't tell you.

Q. Where is the list now, this very last list that you received from Mr. Brown? Where would it be?

A. Well, one of these might be it. Let's see. August 23, 1946. That might be the last list.

Q. And that is a list of a little over 1000?

A. Yes.

Q. So according to the best of your recollection, at the time when you mailed out questionnaires to a few more than a thousand people on lists submitted by Mr. Brown, you mailed questionnaires to somewhere between 1500 and 2000 people from cards selected from the 25,000 or 30,000 cards you have referred to?

(Testimony of Edmund L. Smith.)

A. Well, there must be another list—oh, here they are. This was received, 500 women.

The Court: For the sake of the record, let's mark those *so will* know what they are.

Mr. Margolis: Let's identify them for the record. [120]

For Exhibit N we have marked a list with the number "500" at the top and marked "received 12/16/45."

The Court: Admitted.

(The questionnaires referred to were received in evidence and marked Defendants' Exhibit N.)

The Court: Do you have some more there?

Mr. Margolis: The last to be marked, as Exhibit O, is a list with the number "1000 plus" at the top and "received 8/23/46."

(The questionnaires referred to were received in evidence and marked Defendants' Exhibit O.)

The Court: Then you have another one?

Mr. Margolis: That has already been marked as Exhibit M, your Honor.

The Court: Go ahead, counsel.

Q. (By Mr. Margolis): You were referring to Exhibit N. Now the questionnaires for Exhibit N were mailed on 9/26/46, is that correct?

A. That is correct.

(Testimony of Edmund L. Smith.)

Q. Now is that the approximate time that you mailed the last questionnaires from cards selected by you?

A. I don't believe there were any cards made at that time—I mean, cards drawn out of the available box at that time.

The Court: Mr. Smith, do you have any list submitted by [121] the commissioner there upon which you have made up cards which have not yet gone into the available drawer?

The Witness: I have perhaps several thousand questionnaires that haven't been gone over.

The Court: Of names submitted by the commissioner?

The Witness: Maybe both.

The Court: Let's just stick to the commissioner for a few minutes.

The Witness: Yes, I would say there are some names on his in there.

The Court: I understood you to say just a few moments ago that the cards for the names of the list submitted by the commissioner do not go into the available box until after they have served as jurors or been excused.

The Witness: That is correct.

The Court: Now do you have any such group of cards in your office at the present time?

The Witness: None.

The Court: They have all served as jurors and gone into the available file, is that correct?

The Witness: No.

(Testimony of Edmund L. Smith.)

The Court: Or are in the current file?

The Witness: That is correct.

The Court: In the current box?

The Witness: That is correct. [122]

Mr. Margolis: I still would like to get this one thing cleared up, if I can.

Q. At the present time you have drawn from the 25,000 or 30,000 cards about 1500 or 2000 cards and you are going to mail questionnaires to the persons whose names appear on those 1500 or 2000 cards? A. Yes.

Q. At the same time are you going to mail questionnaires to persons appearing on a list submitted by Mr. Brown?

A. Yes; that is approximately the same.

Q. Do you have that list? A. No.

Q. Do you expect to get that list in the near future, is that it? A. Yes.

Q. How many names will be on that list, do you know? A. No, I don't know.

Q. How many names are usually on those lists?

A. Various, as we have seen here. Here is a list with 1000 names, another with approximately 500, and one with 69 names on it.

Q. Do you know, with regard to Exhibits M, N and O, and the dates which appear thereon, when the questionnaires were sent out?

A. No, I do not except on Exhibit N where the clerk [123] who has mailed them has noted that the questionnaires were mailed on September 26, 1946.

(Testimony of Edmund L. Smith.)

Q. Let's stick to Exhibit N then. Do you know how many questionnaires were mailed altogether during that period? A. I do not.

Q. Do you know how many questionnaires were sent to persons whose names appeared on cards selected from the 25,000 or 30,000 cards at that time?

A. There were very few, very few.

Q. Do you know how many?

A. No, I don't.

Q. When you go through 25,000 or 30,000 cards for the purpose of selecting names, what method do you use in selecting cards which determines, first, which cards you will select and, second, how many cards you will select?

A. I kind of look for the date, alphabetically starting with the days, and I go through the cards haphazardly and pull out the first card I come to, say with a date 1940 on it, showing either excused or impaneled, with no date subsequent to 1940 or '41. I look primarily for that date, look at that date.

Q. Do you look for the date, just for the date 1940? A. Yes, or prior.

Q. Or prior? A. Yes. [124]

Q. In other words, you will pull out all cards of jurors who have either served or were excused prior to 1940 or during the year 1940 and who have not served since that time?

A. That is right, except I wouldn't say that I pull all of them, because I may miss some of them.

Q. But your purpose in going through is to pull all of them? A. Not all of them.

(Testimony of Edmund L. Smith.)

Q. How do you determine which of them you will pull and which of them you will not?

A. I go through the alphabet and approximately take some names from each letter of the alphabet.

Q. Let's say you come to the letter A, and let's say that there are 2500 cards of persons who have served, let's say a thousand cards of persons who have served during or prior to 1940, or were excused and haven't served since; how would you determine which of those 1000 cards from the letter A would select? A. Just chance.

Q. What do you mean by chance? Would you take the first few hundred you came to?

A. According to how much time I had.

Q. Well, you start with the letter A at the beginning and you will go as far as you have time to go through that letter taking out all of the cards as they appear of jurors who served or were excused in 1940 or prior thereto, and haven't served since then? [125] A. Not all of them.

Q. How do you determine which ones you do and which ones you do not pull out?

A. Just by chance.

Q. When you say just by chance, do you just shut your eyes and not look at the cards, or what do you do?

A. I said I looked at the date but I do not take—if I take four or five cards, I might jump four or five or I might jump ten.

(Testimony of Edmund L. Smith.)

Q. And you will take, if you were selecting cards, as you jump along you will take all of the cards?

A. Only those cards——

Q. Only those cards dated 1940 or prior thereto?

A. That is right. I may by chance get in a card in '41 or '42.

Q. Now within the 855 that were put in the box in January 1947, do you have any idea how many or what the approximate percentage were that were selected from the 25,000 or 30,000 cards?

A. Very few.

Q. Do you have any idea?

A. No, because most of the cards for this present panel were mostly submitted by the jury commissioner and selected from those who had not served before. [126]

Q. Do you know how many were selected by the jury commissioner and how many by yourself?

A. No, but approximately all of them, the majority of them.

Q. When did you last select——

The Court: Majority of what?

The Witness: In answer to his question, the majority of the names were submitted by the jury commissioner.

The Court: That is, the majority of the 855 names?

The Witness: Yes.

On December 28 we put in 70 additional names, put in 567 first and I believe those 70 were all women.

(Testimony of Edmund L. Smith.)

Q. (By Mr. Margolis): The 70 additional names were all women, is that right? A. Yes.

Q. How about the 567?

A. They were both men and women.

Q. And they came from both sources, is that right?

A. No, the great majority of the women are submitted by the jury commissioner.

Q. But the 567 cards came from both sources, isn't that right?

A. Yes, with the qualification that very few came from the available box at that time. [127]

Q. How about during the year 1946?

A. That was, as evidenced here, perhaps 50 per cent from each source, the jury commissioner and the available cards.

Q. That is the ones from which the February 1946 grand jury were drawn?

A. That is correct.

Q. Now in your affidavit you say that in addition to selecting names from 25,000 or 30,000 cards, you have submitted names of wives of men selected for service who were disqualified?

A. That ought to be, excused or disqualified.

Q. Those would constitute a very, very small number, would they not?

A. Comparatively; yes.

Q. Just a few names here and there, is that right? A. Yes, that is right.

Q. And are those pretty much the situation where the husbands volunteered the services of their wives?

(Testimony of Edmund L. Smith.)

A. Well, they will give the name of their wife and say, "Well, the judge excused me but here is the name of my wife. She can serve."

Q. Where does the suggestion come from? Does it originate from you, "maybe your wife would like to serve?" or does it originate from the excused or disqualified juror? [128] A. Both.

Q. You sometimes suggest, "How about your wife," is that right?

A. Yes, and they sometimes submit the name.

Q. Now when does this occur? Does this occur at the time that the jury is being impaneled?

A. Oh, at various times.

Q. Do these people come in and talk to you and ask to be excused or disqualified?

A. Sometimes they come in and sign their pay voucher and sometimes when they are excused they will come into the clerk's office.

Q. What do they come in for when they are excused?

A. Sometimes to sign a pay voucher and sometimes the judge will excuse them and send them in there to notify the clerk.

The Court: To notify you?

The Witness: Yes.

The Court: To take them off the list?

The Witness: Yes.

Q. (By Mr. Margolis): How about disqualified jurors, do they come in in the same way?

A. Those who are excused for incompetency would be at the time or prior to the impanelment.

(Testimony of Edmund L. Smith.)

Q. And you excuse them for incompetency, is that right? A. What?

Q. Who excuses these people?

A. The Court is the only one who excuses them for incompetency or otherwise.

Q. You refer in your affidavit to furnishing lists of colored people. When did you furnish a list of colored people?

A. A year or two ago.

Q. How did you happen to furnish a list of colored people a year or two ago?

A. I asked the colored deputy in my office to—at the time we were getting names ready for the box—to get me a list of colored people.

Q. Did you tell him where to get the list or how to get it?

A. No, I thought he had sense enough to get it himself. I sent questionnaires out through him.

Q. Did you ask him to select a list from his friends or to go from house to house? How was he to get this list of colored people?

A. I didn't tell him.

Q. Just submit a list of colored people, is that what you told him? A. Yes. [130]

Q. How big a list did he submit?

A. Oh, there were several lists. They weren't very big lists.

Q. Ten, fifteen, twenty, fifty?

A. Something like that.

Q. Something like what?

(Testimony of Edmund L. Smith.)

A. There was one list I believe from a veterans organization, that is, he told me it came from a veterans organization.

The Court: How big was that list?

The Witness: I don't remember. There was one of them that had——

The Court: Do you have those lists?

The Witness: No. As I say, we discard the lists when the cards are made up and work only from the cards. We don't work from the lists.

The lists are never checked. We haven't the clerical help to do that. They are never checked to find out how many actually returned the questionnaire. That hasn't been done.

The Court: The only function that the list performs then is to be a mailing list for the questionnaires?

The Witness: That is right.

Q. (By Mr. Margolis): Do you know how many were on these lists of colored people? [131]

A. No, I don't.

Q. You don't have any idea?

A. I would say less than a hundred.

Q. On each of the lists?

A. No, altogether.

Q. When was the first time you got such a list and when was the last time?

A. I don't remember that. As I say, about a year or two ago was the last list.

Q. What was the reason for getting a special list of colored people?

(Testimony of Edmund L. Smith.)

A. I wanted some more names in the box.

Q. You felt that it wasn't necessary in 1946 and 1947, is that right?

A. The colored people were coming in then on the venires. The former clerk had placed colored people in the box.

Q. You say a former clerk had placed them?

A. Yes, my predecessor had placed colored people on the list that he obtained, the jury commissioner, and those were in the available box mixed up with all the others.

Q. Did you find that the lists submitted to you by Mr. Brown contained an average proportion of colored people?

A. Yes. I believe some of these lists contained colored people.

The Court: Can you tell by looking at the list?

The Witness: No.

The Court: How do you know they do?

The Witness: Only by my observation in the courtroom when they come in.

Q. (By Mr. Margolis): You didn't obtain an extra list for 1947, is that right? A. No.

Q. Did you obtain one for 1946.

A. I can't say whether any of those were in that box at that time or not. I believe they were.

Q. Do you know how many colored people there were in the group of 855? A. No, I do not.

Q. Do you have any idea? A. No, I don't.

Q. Were there more than two?

A. I am positive of that.

(Testimony of Edmund L. Smith.)

Q. Were there more than 10?

A. I wouldn't say as to that.

Q. Now you refer also in your affidavit to other lists. You say lists of colored people and others. What do you refer to by the word "others"?

A. From the lists that I have spoken of made up from time to time of jurors submitting their wives' names, and I [133] remember at one time, since the Chinese Nationality Act, I got up the names of some Chinese from the records in my office. I can't think of any others.

The Court: Naturalized Chinese?

The Witness: Both.

Q. (By Mr. Margolis): When you refer to certain records in your office, what were those records? A. Naturalization records.

Q. Then you got from those the list of Chinese, and that list was one of naturalized Chinese?

A. No, both naturalized and native-born.

Q. Where did you get the names of the native-born Chinese?

A. From the records in my office.

Q. What records?

A. The naturalization records, from the witnesses; not only the applicant himself but the witnesses too.

Q. Now are there any other lists that you refer to in your affidavit?

A. I can't think of any right now.

The Court: Mr. Smith, actually in the 25,000 or 30,000 names that you have in that box, as I

(Testimony of Edmund L. Smith.)

gather from your testimony, you have supplied a comparatively few of them.

The Witness: That is correct. [134]

The Court: Would you estimate that of the 25,000 or 30,000 names that you have supplied approximately 2000 or 3000, or more or less?

The Witness: Less.

The Court: Less than two or three thousand?

The Witness: Yes.

The Court: So that the 25,000 or 30,000 names as they are on the cards in your office at this time are these names that has been accumulated there and the ones that have been made up and added to by the jury commissioner from time to time?

The Witness: That is correct.

The Court: And previous clerks and previous jury commissioners?

The Witness: Yes, you see, I have two other divisions, two other jury commissioners.

The Court: Well, now, one thing I would like to ask—were you concluded?

Mr. Margolis: I had finished my questions, your Honor, unless there is something that you want to add.

The Court: I still want to go back to the situation we were discussing a while ago about these cards from the jury commissioner.

I understood you to say that these cards are not put into the available list until the persons have been called for [135] service on the jury and served or excused, is that right?

The Witness: That is correct.

(Testimony of Edmund L. Smith.)

The Court: From the list submitted by the jury commissioner?

The Witness: That is right.

The Court: And that you do not now have any segregated cards in that class in your office?

The Witness: There is a box of cards that haven't been mailed yet.

The Court: Haven't been mailed what?

The Witness: There was a mixup in the system. We had to get some names quickly and there are approximately—I stated before that there were no cards—I remember now there are approximately maybe a thousand cards or so, and I was not sure that questionnaires had not been mailed out. Envelopes had been typed and I haven't checked the envelopes to see whether they matched the cards or not.

The Court: Well, now, I understood you to also say that people who have served on the jury, their name does not go back into the available box for at least a year, is that right?

The Witness: At least two years at the minimum.

The Court: That is kept in a segregated file, is that right?

The Witness: It has been lately but not previously. [136] Previous to 1945 they went into the available box with all the others alphabetically under the one alphabet.

The Court: Previous to 1945?

The Witness: Yes.

(Testimony of Edmund L. Smith.)

The Court: Well, now, where are the women who served on the grand jury in 1946, the names of the women who served on the petit juries during 1946?

The Witness: Here are the ones that were drawn and the exhibit here of the grand jury of the 23 who served.

The Court: You mean the cards? Where are the cards segregated?

The Witness: Right there. The cards of the grand jury are in here as an exhibit, and the petit jury cards of the venire are here.

The Court: There are all the men and women?

The Witness: Men and women.

The Court: And those are taken now out of your box that you reserve for a year or two before you put back into your available box?

The Witness: These will go into that box.

The Court: That separate box?

The Witness: That is right.

The Court: I see. [137]

* * *

EDMUND L. SMITH

the witness on the stand at the time of adjournment, resumed the stand and testified further as follows:

* * *

The Court: Mr. Smith, did you bring with you all of the lists you had that were submitted by Mr. Brown, the commissioner?

(Testimony of Edmund L. Smith.)

The Witness: I have found some more lists. I wouldn't say that they are all; no.

The Court: You found some more?

The Witness: The lists are discarded and we don't use them after the cards have been typed.

The Court: What lists have you there? Will you identify them by time?

The Witness: The first list was—— [145]

The Court: Have you got them consecutively there?

The Witness: No.

The Court: Let's arrange them consecutively.

The Witness: Consecutively as to what?

The Court: Time.

The Witness: Time of what?

The Court: The present calendar we are using.

The Witness: Here is a list marked "questionnaires mailed 11/9/45 except red checked marked pages." All of the names were not used.

The Court: Have you got them arranged there as to dates?

The Witness: Here is another list "questionnaires mailed 11/16/45." That is later.

The other list doesn't show when the questionnaires were mailed.

The Court: Does it show when it was received or some approximate date?

The Witness: Later on, on July 30, 1945, there were 495 used and put in the box.

The Court: Just a minute. I see Mr. Brown is in the courtroom. Let me ask him a question.

(Testimony of Edmund L. Smith.)

If you take the stand, will you be able to advise when you submitted these lists? Do you have any record or memorandum of them?

Mr. Brown: Your Honor, how far back? [146]

The Court: Various lists, say the last two years.

Mr. Brown: Yes. I think perhaps I could but I would have to bring them in. I have some lists.

The Court: You have duplicates at home?

Mr. Brown: Not on all of them. Well, I might, but I don't know.

The Court: You can show the date they were submitted?

Mr. Brown: I think I could, if you don't take me back too far.

The Court: How far back?

Mr. Brown: I think two or three years.

The Court: That is plenty.

Mr. Brown: I will try to get them. I am not sure about it though.

The Court: Very well.

Just hand those lists to the Clerk and he will mark them. Designate them as to date and give them a number alphabetically according to their date.

The Clerk: The list dated May 11, 1944, will be Exhibit P.

(The list referred to was marked Defendants' Exhibit P and received in evidence.)

The Clerk: The list dated at the top, and also notation "put in box 7/30/45" will be Exhibit Q.

(Testimony of Edmund L. Smith.)

(The list referred to was received in evidence and marked Defendants' Exhibit Q.)

The Clerk: And the list marked "put in box 7/30/45," list of 390, will be Defendants' Exhibit R.

(The list referred to was received in evidence and marked Defendants' Exhibit R.)

The Clerk: And "1000 put in box 11/16/45" will be Defendants' Exhibit S.

(The list referred to was received in evidence and marked Defendants' Exhibit S.)

The Court: One of the exhibits yesterday was in November 1945 also I think, wasn't it?

The Clerk: December 16, 1945.

The Court: Here is one for 11/8/45. Let me see the December 16, 1945, and the 11/8/45.

(The documents referred to were passed to the Court.)

The Clerk: Here is a list which is Defendants' Exhibit R, "put 390 in the box 7/30/45," and "questionnaires mailed 11/8/45."

The Court: Now, Mr. Smith, you have heard these exhibits described. There is M, N, R and S which, from the records, would indicate that questionnaires were mailed in the latter part of 1945. Would your processing on them, that is, the questionnaires and the carding, and so forth, have been completed in time for these names to be part of the February 1946 master box? [148]

(Testimony of Edmund L. Smith.)

The Witness: Part of them would. As I say, we were limited by clerical help and only a portion of them would be processed.

The Court: Only a portion would have reached that stage where they could go into the master box where you select the name and the commissioner selects the name alternately?

The Witness: That is correct. At that time we placed 637 names in the box. That is all we had processed.

The Court: And all of those names of the 637 names came from these lists?

The Witness: No.

The Court: How many of those would you say came from these lists?

The Witness: From the cards that I had here and which are on the clerk's desk, I said that it indicates by those cards that perhaps 50 per cent had been called before and indicates that those cards came out of the same box.

Mr. Calverley: I think, your Honor, this batch of cards which are those drawn for the petit jury panel in 1946 should be introduced as an exhibit.

The Court: I thought they were.

Mr. Calverley: They were not, just the grand jury cards.

I will offer them as Plaintiff's Exhibit 1.

The Court: We will give them a defendants' letter. [149]

(Testimony of Edmund L. Smith.)

Mr. Margolis: No objection.

The Clerk: T.

(The documents referred to were received in evidence and marked Defendants' Exhibit T.)

The Court: These were just the petit jury and other batch of cards were the grand jury, and the two of them together do not make up the master box or the master list of 637 names?

The Witness: No, they do not because they were drawn out at that time on December 29, 1945, there were drawn 300 petit and 50 grand jurors, leaving a balance in the box of 287. There is no way to ascertain which names those 287 are.

The Court: From the method which you followed and your experience in putting these names in the box, would you be able to state whether or not, in your opinion, the remainder of the names—how many are there, did you say?

The Witness: 287.

The Court: —287 names would have been selected in the same manner as those cards indicated by Exhibit T?

The Witness: Yes.

The Court: They would be?

The Witness: They would be.

The Court: In other words, about half of your available file and the other half from currently submitted lists by the commissioner? [150]

The Witness: Approximately.

(Testimony of Edmund L. Smith.)

The Court: Very well.

Mr. Margolis: May I ask a few questions on the new exhibit?

The Court: All right.

Direct Examination

By Mr. Margolis:

Q. I want to refer to Exhibit R, Mr. Smith. I notice that that Exhibit R says "put 390 in 7/30/45, questionnaires mailed 7/9/45." Were the questionnaires mailed in this case after they were put in the box?

A. You didn't read all of it.

Q. "Except red checked marked pages." I wonder if you would explain what that means? I just want to find out what happened. When were the questionnaires mailed and when were they put in the box?

A. The questionnaires for the 390 put in box on July 30, 1945, must have been mailed prior to that time.

The Court: What your note means is that 397 names, or 390 names put in the box in July, that the questionnaires were mailed for the remainder in November, is that what you mean?

The Witness: That is correct, not the remainder, not all of them, no, only those of these pages that are checked in red. That is the clerk's check mark taking every two pages or [152] so, jumping here, because there are approximately 1175 names on there and we wouldn't have time to get them all out in time.

(Testimony of Edmund L. Smith.)

Q. (By Mr. Margolis): Let me see if I get the procedure correctly. When you get one of these lists you do not send out questionnaires simultaneously or even over a period of a week or two or three weeks to all of the persons on those lists?

A. No.

Q. You may send them out, some out one month and some out three, four, five months later, is that right? A. That is right.

Q. And then after the questionnaires come back, regardless of whether or not questionnaires have been sent out to other people on the list, you use or you may use all or part of those questionnaires for obtaining persons to put in the master box?

A. That is right.

Mr. Margolis: I have no further questions, your Honor.

The Court: All right, Mr. Calverley.

Cross-Examination

By Mr. Calverley:

Q. Mr. Smith, you testified yesterday to the effect that you maintained two boxes, which I believe you described as the No. 1 box or No. 2 box?

A. Yes.

Q. For which qualified prospective petit jurors are drawn? A. That is correct.

Q. Was that done pursuant to a court order?

A. Yes.

(Exhibiting document to counsel.)

The Court: Is this the order?

(Testimony of Edmund L. Smith.)

The Witness: Yes.

The Court: Have you finished with the order?

Mr. Garrett: Yes.

Mr. Calverley: If the Court please, we have a certified copy of the order.

The Court: Here it is.

The Witness: You have another one?

The Court: You have another one?

Mr. Calverley: Yes, your Honor. It is dated December 23, 1941, entitled "In the Matter of Order Governing Impanelment and Service of Trial Jury in Central Division of the Court."

We would like to offer this order into evidence, if the Court please.

The Court: Government's Exhibit No. 1. Admitted.

(The order referred to was received in evidence and marked Government's Exhibit No. 1.)

The Court: Since that order has been made, that is the procedure which has been followed?

The Witness: That is true.

Q. (By Mr. Calverley): Has there been any change since that order was made in the procedure followed as designated therein?

A. No change, except I might state this, that impanelment of this February 17th jury last Monday, instead of those names physically going into the box following this procedure, that panel was ordered to report in here for this case. That is a variation, but with that exception—

(Testimony of Edmund L. Smith.)

Q. I don't recall, Mr. Smith, if you testified yesterday to this fact or to this question, but I will ask it: What is your policy with reference to the length of time that you keep these questionnaires?

A. There is no policy.

Q. When did you usually destroy them or discard them?

A. I have just discovered that they are discarded apparently after a year or two after they are finished with them, those excused I did find those who had been impaneled [154] but I did not find those who had been excused.

Now some of those were used on subsequent panels, I am sure, and that is where the questionnaires may be. The others, I don't know where they are. They were discarded, used or destroyed, because we are not placing names in the box under the system now without sending out fresh questionnaires each time.

The Court: Each time?

The Witness: That is, before the names are placed in the box.

Q. (By Mr. Calverley): Now do you ever discard questionnaires before they have been processed in the way you have described here? A. Yes.

Q. When do you do that? Will you explain why?

A. Well, in placing them in alphabetical order, if the questionnaire doesn't show competency on the face of it, it would be discarded.

Q. You state that it would be discarded if it doesn't show competency on the fact of it. Where

(Testimony of Edmund L. Smith.)

do you look, or what guide do you follow, to determine competency?

A. We follow Section 411, Title 28 of the United States Code and pursuant thereto Section 198 and 199 of the Code of Civil Procedure of California.

Q. Now, if, in answer to the questionnaire a prospective [155] juror answers a question that indicates that he is incompetent under the sections you have mentioned, you discard that questionnaire, is that right?

A. Yes, if it shows on the fact of it.

Q. And the prospective juror's name does not go into the reserve file, which includes the available box which you have in your office, is that right?

A. No.

Q. Neither does his name go into the master box?

A. No.

Q. Now I have handed you Defendants' Exhibit B, I believe it is, which is a form of questionnaire used by your office, and I will direct your attention to question No. 5, which is: "Occupation or business." Do you pay any attention to the answer given to that question?

A. No. That was not placed in there by me or my office; it was placed in there at the direction of the Court. That was for the purpose of the use of the Court.

Q. You don't pay any attention to that question at all or to the answer given?

A. Not at all.

(Testimony of Edmund L. Smith.)

Q. If an individual fails to answer that question entirely, do you pay any attention to it?

A. No. Question 6: Are you a citizen of the United States?" If he says "no," we just throw it out. [156]

Q. Now can you state——

The Court: By virtue of the fact that he is disqualified under the statute?

The Witness: That is correct.

The Court: How do you determine whether they are incompetent or otherwise?

The Witness: In that way by answers to the questions.

The Court: Have you ever found anybody incompetent?

The Witness: Yes, lots of them.

The Court: What kind of an answer do they give, that is what I am trying to get at. How do you decide whether they are competent or incompetent from the answers they give?

The Witness: Question No. 6: "Are you a citizen of the United States?"

"No."

He is incompetent.

"Date of birth?"

"Born in 1935."

He is incompetent.

The Court: That is to say, that they are less than 21 years of age?

(Testimony of Edmund L. Smith.)

The Witness: That is correct. "Have you ever served as a juror?"

"Yes."

"If so, when?" [157]

"Within the last year."

He is incompetent.

"How long have you lived in the southern district of California?"

"One month."

He is incompetent.

The Court: Well, if their residence address, I suppose is outside of the state——

The Witness: If he sends back the questionnaire and gives his address as Wilwaukee, Wisconsin, he is incompetent.

If he states that he has given up his residence address here, he is incompetent.

The Court: Now in question 10, on exemptions, do you pay any attention to that?

The Witness: Yes. In connection with the date of birth, if a juror of ancient age states, in answer to question 10, "I am deaf in one ear and can't hear out of the other," that is presumptive that he is not in possession of his natural faculties under Section 198.

The Court: On any of the other stated grounds of exemption in the California Code, do you pay any attention to that?

The Witness: No.

The Court: Suppose a man says he is an embalmer or undertaker or preacher? [158]

(Testimony of Edmund L. Smith.)

The Witness: No, I don't think we have anything to do with that. That is up to the Court.

The Court: Well, you say you don't think you have anything to do with it. Do you pay any attention to it?

The Witness: No.

The Court: Regardless of what that answer is, unless it indicates that the person is decrepit or physically incompetent or he does not have an understanding of the English language, or has committed a felony or other high crime or misdemeanor, you pay no attention to the exemption?

The Witness: No, with some isolated instances. Now if it is called to my attention that he claims that he is a practicing attorney, and I see who it is, and it is called to my attention I wouldn't put his name in. And in one or two instances, in a few instances, where a prospective juror who is a woman has stated that she has small children of tender years, several of them, and she is alone with them, why in one or two instances I say we have left the names out.

The Court: Go ahead.

Q. (By Mr. Calverley): Is that the extent of your disregarding the questionnaires on the ground of incompetency?

A. Also where they stated, lots of times a questionnaire would reach a soldier or service man in the Navy or Army and he would state that he is in the service and not in the [159] district, we would disregard that questionnaire.

(Testimony of Edmund L. Smith.)

The Court: What if he said he was a policeman?

The Witness: No.

The Court: You would not disregard that?

The Witness: That is up to the judge.

The Court: What if he said he was an FBI agent assigned to the investigation of antitrust cases?

The Witness: Well, I have never seen any that I recollect.

Q. (By Mr. Calverley): Have you had instances in which a prospective juror has stated he doesn't understand the English language?

A. Yes.

Q. What would you do in case an individual made such a statement?

A. Put his name in the box and let the judge pass on it. If he answers the questionnaire he is of ordinary intelligence.

Q. Can you state whether or not the names that are in the reserve file in the availability box contains the names of individuals who reside in Los Angeles County?

A. I didn't get that question.

Mr. Calverley: Read it, Mr. Reporter.

(The question referred to was read by the reporter, as set forth above.) [160]

The Witness: Yes.

Q. (By Mr. Calverley): Do you have the names of residents of other counties in this district in that reserve file and which includes the availability box?

A. Yes, some of them.

(Testimony of Edmund L. Smith.)

Q. You testified yesterday that in selecting the names which go into the master box that you went through the reserve file, the availability box and jumped through the alphabet, picking out a number of cards at random through the file.

A. That is right.

Q. Did you follow any practice or policy with reference to the geographical location in which these various individuals lived whose names were pulled out of this source?

A. Yes. The order of court states the wording of the statute, Section 413, Title 28, which was first enacted in 1789, that at the direction of the Court from time to time the jurors shall be drawn from the portions of the districts so as to not unduly burden the citizens of one portion and not to incur unnecessary expense. We consider that in selecting in so far as we can.

The Court: That is, when you take names out of the available box?

The Witness: That is correct. [161]

Q. (By Mr. Calverley): Is it true that if you see there are too many names that are taken out from, say, the city of Glendale, you will put some of them back and try to find names from other locations?

A. Yes, some from Long Beach, and so forth. We try to get north, south, east and west as a general rule.

Q. Have you ever at any time, Mr. Smith, since you have been clerk of the District Court, thrown

(Testimony of Edmund L. Smith.)

out the questionnaire of any prospective juror or failed to make the card for him or thrown a card out of the reserve file, or the availability box, because the prospective juror indicated in his questionnaire or otherwise that he was a laborer working by the day or a member of a labor union?

A. No. I have had lots of them.

Q. Have you ever at any time thrown out the name of any prospective juror from your files or from the questionnaire who indicated that he was a Negro?

A. No. I have never seen a questionnaire that indicated what race or color he belonged to, that I recollect. When the questionnaires come back I don't pay any attention to the source, and it is not checked with the list or with the cards.

Q. Did you, in obtaining the lists that you testified to yesterday and which are referred to in your affidavit on file here of colored people, and I believe Chinese citizens [162] and possibly others, you didn't recall, did you ever direct that those lists be prepared on the basis of anyone's occupation or business?

A. No, never.

The Court: When you told Harry Beal to get a list of cards, did you tell him how many or did you tell him to get as many as he could get?

The Witness: As many as he could get. I like to have as many names as I can get every time.

Mr. Calverley: That is all, your Honor.

The Court: Further questions?

Mr. Margolis: Yes.

(Testimony of Edmund L. Smith.)

Redirect Examination

By Mr. Margolis:

Q. I am not sure that I understood you with regard to utilization of persons who live outside of Los Angeles County. You generally confine your selection to people who live within the county?

A. Most usually, in pursuance of that order.

Q. In other words, it is very rarely that you go outside the county, is that right?

A. Yes.

Q. Do you know of any instances in which you have gone outside the county?

A. Oh, yes. There have been from Santa Ana, San Bernardino, Riverside. [163]

Q. They are the rare exceptions, is that right?

A. I don't go that far because of the inhibition of the statute.

Q. You testified that with regard to the panel which was selected or ordered to report on February 17, 1947, that the usual practice was not followed and that instead of the names physically going into the box they were ordered in here directly. I wonder if you would explain a little more in detail, what you mean by that. Instead of physically going into what box?

A. In the box that is described in this order.

Mr. Calverley: Government's Exhibit 1.

Q. (By Mr. Margolis): Are you referring to the master box?

(Testimony of Edmund L. Smith.)

A. No, no. The names were in the first instance drawn from the master box. We are through with that. I am talking about these little tin boxes that the deputy has.

The Court: The alternate boxes?

The Witness: Yes.

The Court: That is where you have those who served and those who haven't served?

The Witness: That is correct.

Q. (By Mr. Margolis): The jurors were sent in here directly instead of their names? [164]

A. You see, there was an element of time. They were impaneled on Monday and supposed to be in here on Tuesday, so the Court just short-circuited the system and notified them right there to appear there instead of the clerk sending out notices, waiting for them to go home and then having to call them up by telephone, or otherwise. The Court simply directed that they report in court that morning.

Q. Was the entire panel so ordered to report?

A. I don't know.

Q. There was a panel of 200, was there not?

A. There was a venire of 200 drawn.

Q. Do you know how many were impaneled?

A. I stated yesterday approximately 70 perhaps were impaneled each time. In answer to the judge here I stated that with both panels we have working jurors now of between 100 and 150.

Q. How many jurors are ordinarily sent into a courtroom when a jury case is about to begin?

A. That is according to what the judge requests.

(Testimony of Edmund L. Smith.)

Q. How does it run? You have had experience as to how it runs.

A. Some 25, some 40. It depends on the case and the request of the judge and counsel.

The Court: I might observe for counsel's benefit that [165] in the trial of the Jehovah's Witness cases, for instance, there is rarely if ever a challenge made. They accept the first 12 in the box. In fact, in most cases the jurors are selected, I should say, from my experience, from a panel of not over 20, and less than that. In most of the criminal cases that are tried they accept the jury without challenge.

If a case has multiple defendants and multiple lawyers, so that there will be an indication that probably all of the challenges will be used, then the clerk of the judge calling it, calls enough jurors so that we will have enough.

Q. (By Mr. Margolis): Would you have any records which would show how many, whether the entire panel was sent in here or part of the panel?

A. Yes, I would. The calendar clerk has that record.

Q. Will you ascertain that for me and give me that information later on? A. Yes.

Q. Now you testified that you pay no attention to the occupation on the questionnaire. What do you mean by that, you don't even look at it?

A. I might see that but that isn't what I am looking for when I look at the questionnaire.

(Testimony of Edmund L. Smith.)

Q. Well, suppose you noticed that a person says he is an attorney, a practicing attorney at law.

A. I said, if it is called to my attention of a practicing attorney that I know is a practicing attorney, and who claims his exemption on that ground, why I would be inclined not to put his name in.

Q. Are there any other instances where that sort of thing occurs?

A. Only what I have stated.

Q. What about doctors?

A. I don't recollect testing out a doctor. I recollect of claims for exemption, or affidavits coming in to the judge and getting them afterwards, and the judge will send for the questionnaire, and I believe that that is where some of these questionnaires went. You spoke about 33 being missing.

Q. Yes.

A. Now I was talking with the calendar clerk and he says that the judge, when a person comes in sometimes to be excused, he will send in for the questionnaire and we never see it again. It is either in the judge's chambers or it may be in there.

Q. In other words, out of 855 questionnaires it is possible that the judge may have asked for as many as 33?

A. That is possible.

Q. Mr. Smith, then I would like to simply find out whether the entire panel was sent in here or

(Testimony of Edmund L. Smith.)

what portion of the panel and how the selection was made from the panel as to the jurors to be sent in here. [167]

The Court: I think it would be well to have it as a matter of record, but I should judge the whole panel was sent in here, judging from the number of people in the audience when I excused them.

Mr. Margolis: If that is the fact, I think it should be in the record.

The Court: I don't know, but that would be my guess.

Mr. Margolis: The witness has said he can ascertain the fact.

The Witness: Yes.

The Court: I would like to ask you a question.

Mr. Calverley asked you whether or not you had ever thrown a card out because a man indicated he was a working man. I have here a dictionary of occupational titles published by the United States Government, Department of Labor, in which the preface indicates that there are 29,999 different kinds of titles to jobs. Did you ever pay any attention to or throw out any card on account of any occupation, whether he was a laboring man or an employer or anything at all except for attorneys?

The Witness: I can't recollect of an instance. There was that woman that I spoke of, the woman that had little children, but there wasn't any occupation involved there.

The Court: All right. [168]

Mr. Calverley: Just one other question, if the Court please.

(Testimony of Edmund L. Smith.)

Recross-Examination

By Mr. Calverley:

Q. Did you ever systematically and intentionally throw out any names from the master box or from your files of prospective jurors because of the nature of their occupation, whatever the nature of it might have been.

A. Never.

Mr. Calverley: That is all.

The Court: Except attorneys where they claimed exemption as attorneys?

The Witness: Except attorneys where they claimed exemption.

The Court: Well, now, why did you turn out attorneys when they claimed exemption? We know that but I don't know that the Supreme Court would know that by the time this case gets there. So let's put that into the record.

The Witness: Well, he is not incompetent but my experience has been over the past 30 years or so that if the attorney claims his exemption he is generally excused, if he is practicing, especially in the court where he is drawn as a juror.

I wouldn't put his name in in the first place, but I wouldn't exclude as a systematic thing attorneys.

The Court: Now we are getting into the reasons why you take attorneys out, because they claim exemption. Let me ask you this question: Do you know of a lawyer who has ever been called and impaneled in the box where either side has failed to challenge him peremptorily?

(Testimony of Edmund L. Smith.)

The Witness: No. I have never seen a practicing attorney, and we have had many of them on the juries up here in the past years. I don't believe they trust each other.

Mr. Garrett: May I ask a few questions, if your Honor please?

The Court: Yes.

Redirect Examination

By Mr. Garrett:

Q. Mr. Smith, these 25,000 to 30,000 cards that are in your index, I think you said they represent jurors who have either served or been called for service in the past, is that right?

A. Yes. And there may be some that have never been called. That is, the name went into the box, it was left over, the card got into the available box when it was emptied, and they never have been called.

Q. And the jurors' cards which represent jurors who are now serving or called for service are on their way to that filing system and will be placed in there after a sufficient length of time has elapsed. so that they will be available again, is that right? [170]

A. Yes. The purpose of the questionnaire primarily was to weed out the chaff, the deceased, the moved out of the district, incompetent jurors, many of them become decrepit, not in possession of their natural faculties, and that may be determined by the clerk.

(Testimony of Edmund L. Smith.)

Q. That is why you send out that questionnaire even on those jurors whose names have been taken from your list of 25,000 to 30,000 cards, is that right?

A. That is correct.

Q. It is true, is it not, with respect to the jurors whose names are represented in those 25,000 or 30,000 cards that some have previously returned questionnaires?

A. I don't believe we have come to that yet.

Q. That would be true only after five years, is that correct?

A. Approximately; yes.

Q. When did you start using the questionnaires?

A. I believe about the time we started placing women's names in the box in 1943 or thereabouts.

The Court: It was following the Conference of Senior Circuit Judges in Washington, where they recommended the use of the questionnaire, did they not?

The Witness: That is correct. [171]

Q. (By Mr. Garrett): Now prior to the time that you started using the questionnaire the names were exclusively drawn from this list of 25,000 or 30,000 cards, were they not?

A. No, no. The same system was used more or less. The jury commissioner furnished the clerk with a list and from that list the cards, tickets, were made up and then were supplemented from the available drawer.

(Testimony of Edmund L. Smith.)

Q. That is what I am getting at. You say that some of those cards in your collection of 25,000 or 30,000 cards date back to 1925, is that correct?

A. I noticed in going through them, I saw one card there of a juror who had been called in 1925.

Q. So you have cards that were made at least that far back?

A. Yes.

Q. About how many of them?

A. I don't know.

The Court: Are there many or few?

The Witness: A few at this time. Most of those will be weeded out because the questionnaires are mailed, and a man that served 20 or 25 years ago we generally find he has become incompetent under the code.

Q. (By Mr. Garrett). Is it a fact that [172] for every one of those 25,000 to 30,000 cards there was originally a name on a list submitted to you by the jury commissioner?

A. I have only been clerk since 1942 and I can't testify to that.

Q. Were you familiar with the practice in the office prior to 1942?

A. More or less. It was the same situation. The clerk would obtain a list from the jury commissioner and the clerk would get a list from various sources, and from those lists the 25,000 or 30,000 have been compiled over the years.

The Court: I understood your statement yesterday in that regard, however, was that the 25,000 or

(Testimony of Edmund L. Smith.)

30,000 names, of that number that not over 2000 came from sources other than the commissioner.

The Witness: That I had to do with.

The Court: You would say then as far as you are concerned, not over 2000?

The Witness: Yes.

Q. (By Mr. Garrett): So that prior to 1943 the great majority of the names which eventually went into those 25,000 or 30,000 cards originally came to the attention of your office as names on lists submitted by the jury commissioner, is that a fair statement?

A. How far back are you going?

Q. I am talking now about the time prior to 1943. [173]

A. No, I would say it was made from lists of the clerk, my predecessors and the jury commissioner during those years.

Q. During those years, what was the method used for obtaining the names on the lists supplied by the clerk as opposed to those on the lists supplied by the jury commissioner?

A. I can't testify to that.

Q. Do you have any knowledge of those lists?

A. There wasn't any systematic—I can state this, from my observation, that there was no systematic method of obtaining lists.

Q. Speaking of the lists originated by the clerk as opposed to those supplied by the jury commissioners, were some of those names supplied by the various judges?

A. That I don't know.

(Testimony of Edmund L. Smith.)

Q. Now prior to the inception of the use of the questionnaires, what was done with the prospective juror after his name was furnished on a list before a card and a ticket was made up on him?

A. The list of names was checked with the cards in the drawers, both available and in the box for duplicates, and then the remainder, where there was a duplicate, the duplicates crossed off and the cards were made up.

Q. The cards were then made up?

A. Made up and tickets made from the cards.

Q. Now after the cards were made up [174] were the tickets immediately made up for use in the various jury boxes, or was there some investigation made as to the qualifications of the juror, the prospective juror?

A. There wasn't any.

The Court: There wasn't any investigation made?

The Witness: Not that I know of.

Q. (By Mr. Garrett): Under that system then, if a juror's name appeared on a list and was still on the list after the names appearing in your card index had been checked off that list, the first time you saw him or communicated with him was when you sent his name to the Marshal, is that correct?

A. The clerk never communicates with a venireman prior to the impanelment, unless he comes in for some purpose, an excuse or something like that, and then he is sent to the judge.

(Testimony of Edmund L. Smith.)

Q. You now communicate with the prospective juror, do you not, through the medium of this questionnaire?

A. That is correct.

Q. Now prior to the time you used that questionnaire, how did you find out whether or not a prospective juror whose name had been previously in your card index possessed what you deem to be the necessary qualifications?

A. There wasn't any method used. [175]

Q. Was there a system of personal interviews in use? A. No.

Q. By that I mean when they found from checking a list that the juror hadn't been called as a juror before, that is, the name on the list had not been called as a juror before, was the first time that juror knew that he was to report for jury duty when he was served by the United States Marshal?

A. That is my recollection.

The Court: All the matter of his qualification and disqualification, competence and incompetence, was determined by questions asked by the trial judge when they appeared in response to the subpoena?

The Witness? That is correct, in response to the summons.

* * *

Q. You keep no record of the questionnaires you send out, do you?

A. No.

(Testimony of Edmund L. Smith.)

Q. You use a list and you use a lot of cards but as soon as the questionnaires have been sent out you destroy that list and put the cards back in the files, is that right?

A. Yes. We work entirely from the cards from there on.

Q. So the appearance of a prospective juror is purely dependent upon his voluntary act in returning the questionnaire, is it not?

A. You call it voluntary or involuntary; yes.

Q. If a prospective juror doesn't return a questionnaire you never follow up to see why he didn't, do you?

A. We haven't had the clerical help to do that.

Q. It is a fact that there is no follow-up whatever used? [177]

A. We haven't used any; no.

Q. And having destroyed the lists and returned the cards to your files on which questionnaires are mailed out, you don't have any basis after that mailing for knowing which addresses have not returned their questionnaires, do you?

A. That is right.

Q. And you have utterly no basis, do you, of knowing what percentage of addresses have returned their questionnaires, do you?

A. No, only in a rough approximation.

Q. And then as soon as the questionnaires are reviewed, you immediately make the decision as to whether or not to make up a new card on them, if

(Testimony of Edmund L. Smith.)

you haven't got already a card, or to pull the card on the questionnaire for the making of the ticket, is that right?

A. Yes. The questionnaires are first arranged in alphabetical order, those that can be compiled and processed at that time, and then there may be other questionnaires coming in at the same time but we can't go back and fill in.

Q. Now you are the head of a large office and I know that your duties are heavy. You must have help from your assistants in the processing of those questionnaires, do you not?

A. That is correct.

Q. If it is the way it is in other offices, [178] and I presume it is in yours, the volume of that work of processing questionnaires requires the assistance of more than one of your assistants at various times?

A. That is true.

Q. And I take it that you don't have any particular assistants that you can assign to that work, so that when even one is processing the questionnaires it may be a different clerk or a different deputy clerk in any given time, is that correct?

A. That is correct.

Q. So that would it be fair to say that a considerable number of clerks in your office exercised from time to time the obligation of processing these returned questionnaires?

A. They do the clerical work.

Q. I see. I am not talking now about the mak-

(Testimony of Edmund L. Smith.)

ing up of the cards and tickets from these questionnaires, I am talking about the business of reading the answers.

A. Oh, no. They have nothing to do with the taking out of questionnaires or putting them in.

The Court: Who makes the decision as to whether or not a person is competent or incompetent? Do you delegate that to one of your deputy clerks?

The Witness: No. They may call my attention to something.

The Court: In other words, they will go [179] through the questionnaires and take a batch out and say, "Well, here is a fellow that was born last year, or three years, ago and is under age?"

The Witness: Or a practicing attorney.

The Court: Or a practicing attorney.

The Witness: Yes.

The Court: In other words, that decision is made by you in each case?

The Witness: And the jury commissioner. I will show them to the jury commissioner.

The Court: You also discuss that with the jury commissioner?

The Witness: Yes.

The Court: So that the two of you together make that decision and the deputy clerk does not make it?

The Witness: That is right.

Q. (By Mr. Garrett): Prior to the time that the processing is completed, are any cards or tickets made out on the basis of the questionnaire?

(Testimony of Edmund L. Smith.)

A. There have been in some instances, but I inaugurated the system of not making out new cards until the questionnaires have been returned, because it is a waste of material and a waste of time, because all of the questionnaires may not be returned. [180]

Q. I am not talking about making out cards and tickets before the questionnaires have been returned, as they might be from the jury's commissioner's lists; I am talking about the making out of cards and tickets on questionnaires that have been returned, while those questionnaires are being processed and before you have passed on them. That has been done in the past, has it not?

A. Oh, the clerks have arranged them in alphabetical order, yes.

Q. And they have made out cards and tickets on them during that process, have they not?

A. Not until we have passed on them.

Q. Now do the assistants that you use in the processing of those cards—I don't mean the work that is done on the master box that you have approved or disapproved—but during the processing of those questionnaires, prior to the time they come to you for approval, do your assistants use any system of marking on those questionnaires or any other record relating to the answers?

A. Some of the questionnaires get in to the judge several times and either his clerk or the bailiff had a method of marking with red pencil, or the judge himself marking "excused," and he was

(Testimony of Edmund L. Smith.)

thinking that those were the jurors that had been impaneled and were asking excuses, or the veniremen sent out and when I found that out why [181] I had those questionnaires all brought in and put in the alphabetical file of those who had not been processed. I think that is where some of those pencil marks on those questionnaires came from. And some of them were put on these after the venire was issued and the judge had sent in for the questionnaire, he would make red marks on there, or other marks.

Q. Can you recall any instance when your assistants have passed upon the qualifications of a prospective juror on the basis of their appraisal of the answers on the questionnaire?

A. No, I have never delegated that authority.

Q. Are there any instances in which your assistants have done that?

A. Not that I know of.

Q. Are there any instances in which the persons have placed grades on the questionnaires prior to your approval or disapproval?

The Court: Placed what?

Mr. Garrett: Grades, the valuations based upon the answers.

The Witness: Not that I know of.

Q. (By Mr. Garrett): Now with respect to the questionnaires themselves on the jurors whose names are not put into the master box, was there any procedure in effect concerning the preservation [181] or destruction of such questionnaires at the time you assumed your office, Mr. Smith?

(Testimony of Edmund L. Smith.)

A. No, no discussion about questionnaires at that time.

Q. I am talking about the ones for the jurors who are not accepted.

The Court: Did they send questionnaires before you became clerk?

The Witness: No, I don't believe so.

The Court: It was subsequent to the time you became clerk?

The Witness: Yes.

Mr. Garrett: I see.

The Court: By the way, what is the reference to that Conference of Senior Circuit Judges, do you know?

The Witness: No, I don't know what year it was in. I can look it up.

Q. (By Mr. Garrett): So the method of handling the questionnaires after they had been used and read originated while you were clerk, is that right?

A. I believe so. There was another system of mailing questionnaires with the summons and that was abandoned after one term.

Q. That was prior to the time you were clerk?

A. That I can't recollect. It might have been in 1942 or shortly prior thereto. [182]

Q. With respect to the questionnaires on jurors whose names do not get into the master box, the rejection of the prospective juror is usually made, I think you testified, by yourself in conference with the jury commissioner?

(Testimony of Edmund L. Smith.)

A. That is right. If we throw out any name, the jury commissioner—I will segregate those and show them to him, and if he takes any out why he puts them in the same category.

Q. As to the names, you take them up with the jury commissioner on the basis of the questionnaires rather than the names on the original list, do you not?

A. Yes. The questionnaires are never checked with the list nor are the cards checked.

Q. The original list in many cases has been thrown away at the time the questionnaire is returned?

A. Well, lost or misplaced because of non-use, never been used.

Q. Anyway, when you and the jury commissioner make your decision you have the questionnaire before you?

A. Yes.

Q. Now in case you and the jury commissioner both approve the juror represented by the questionnaire, the questionnaire is preserved, is that right?

A. Oh, yes. If the name goes in the box the questionnaire is preserved until that juror has completed service. [183]

Q. Those are the questionnaires that are here in evidence now, are they not?

A. That is true.

Q. Now when you and the jury commissioner look at a questionnaire and one or the other of you brings up an objection and there is agreement that

(Testimony of Edmund L. Smith.)

the objection is a good one, what do you then physically do with that questionnaire?

A. Put them in a pile and probably eventually throw them in the wastebasket.

Q. Has there ever been any system for the filing or preservation of those questionnaires representing rejected prospective jurors?

A. No, no.

Q. Have there been any cases in which those questionnaires have been preserved?

The Court: That is, those that are rejected by the clerk on the ground of obvious incompetency?

Mr. Garrett: That is correct, your Honor.

The Court: Not those that are rejected by the Court?

Mr. Garrett: Yes, I am referring, if your Honor please to this situation, where the rejection is made——

The Court: By the clerk and the commissioner on the ground of incompetency?

Mr. Garrett: ——at the time they have the questionnaire before them. Yes, your Honor. [184]

Is any endorsement made on the questionnaire of the rejected juror?

A. No.

Q. Have there been any instances?

A. Usually not.

Q. Have there been any instances in which questionnaires of such jurors so rejected have, for any reason, been preserved?

(Testimony of Edmund L. Smith.)

A. Not intentionally preserved, because if they are incompetent we don't want the card or any ticket or any possibility of getting them back into the box, and if there was a card that would be mostly preserved in what we call the leave-out box.

Q. But that would only be because there had been a clerical error and that it had not been taken out and destroyed, is that right?

A. Yes.

Q. The usual procedure is that when a questionnaire is decided upon adversely by you and the jury commissioner, if it is a name that came from one of the jury commissioner's lists, then there is no card on it and you don't have to do anything further, is that right, with respect to any card?

A. Yes, if there is no card made up.

Q. But if it is a name that came from your card index, then the usual procedure is, upon the rejection, to take that card out of your index and destroy it? [185]

A. That should be done; yes.

Q. But sometimes it isn't?

A. That is right.

Q. I have one other question—I don't know whether it has been asked before but if it has I will ask leave to ask it again—have you got in your office or under your control any questionnaires returned by prospective jurors, which jurors have been rejected and their names not placed in the box?

A. There may be, but——

(Testimony of Edmund L. Smith.)

The Court: You are still speaking of those rejected by the clerk and the commissioner on the ground of incompetency?

Mr. Garrett: Yes, your Honor.

The Witness: There is no way of telling because I have a lot of questionnaires that I just laid aside that haven't been processed, and which are in the process of mailing other questionnaires out now.

The Court: If they haven't been processed then you wouldn't have determined that they were incompetent, would you?

The Witness: No.

The Court: Then the answer to his question is no, isn't it, that you don't have of those who have been rejected by you and the commissioner on the ground of incompetency? [186]

The Witness: I don't believe so unless they are mixed in. There might be some that got back into the questionnaires that haven't been used. That is a possibility.

The Court: If that is the case, that is not by design, is it?

The Witness: No, no.

Mr. Garrett: No further questions.

The Court: Mr. Clerk, one of the grounds of disqualification of a juror is conviction of malfeasance in office or other felony or other high crime. I notice you have no question on there that indicates that.

The Witness: I have had in the past, I recollect now.

(Testimony of Edmund L. Smith.)

The Court: Is there any reason why you have not indicated a special question on that?

The Witness: I don't know. This questionnaire was gotten up by the Court.

The Court: All right. Is there any way that you undertake to determine that?

The Witness: No, unless, as I have seen on a questionnaire, included in an answer to the other questions of incompetency, if it is shown on its face that the prospective juror was incompetent, for instance, claimed exemption, I have seen there a statement by a prospective juror that he had been convicted of drunk driving two or three times, or some felony, and stated it as an exemption or an excuse.

The Court: What do you do with that? [188]

The Witness: If he made such a statement we would throw the questionnaire out if it came to my attention.

The Court: That is, you conclude that that is incompetence and his name is not included?

The Witness: Yes, under Section 199.

The Court: Do you make a systematic call upon the Federal Bureau of Investigation and their fingerprint department to determine whether or not they have any identification of these persons?

The Witness: No.

The Court: Nor of any other recording agency?

The Witness: No.

The Court: Is that ascertained by question of the judge at the time of impanelment?

(Testimony of Edmund L. Smith.)

The Witness: At the time of impanelment in open court, I have heard the judge state many, many times, that the disqualifications for incompetency of a juror, and of course he will elaborate that if any have been convicted of serious crime they not indicate it there in open court but to inform the judge in chambers of such before he is ever impaneled in the case, instead of being a serious matter if it wasn't revealed.

The Court: Do you have some more questions?

Mr. Calverley: Just one. [189]

Recross-Examination

By Mr. Calverley:

Q. Can you state, Mr. Smith, approximately what percentage of the questionnaires that have been mailed out have been returned within the past two years?

A. I only recollect that at one time—and I believe it was in the years '44 and '45—that one time we estimated we had mailed out between 5000 and 6000 questionnaires and at that time we had only returned about 1800.

Q. Do you have any other figures as to the approximate number of questionnaires returned other than your estimate that you have just indicated?

A. Only a chart that was sent out by the director of the administrative office of the records in the courts in the District of Columbia, and my observation of them was that the proportions and percentages of the returns were approximately what he had been getting here.

(Testimony of Edmund L. Smith.)

The Witness: Well, I would say from one-fourth to perhaps 33 1/3 per cent.

The Court: Returns?

The Witness: Yes. But it has never been checked.

The Court: In other words, approximately 70 per cent of the names submitted, whether out of your box, the jury commissioner's list, or any other source do not answer? [190]

The Witness: Yes.

* * *

The Court: Mr. Clerk, previous to the present system of impaneling the petit jurors, each judge of the court impaneled his own panel, is that not correct?

The Witness: That is correct.

The Court: Do you know what date that system changed now to where we have what he call the pool system?

The Witness: The order of court, Government's Exhibit No. 1, dated December 23, 1941, inaugurated the present system. [191]

The Court: Inaugurated the present system and constituted the abandonment of the previous system whereby each judge had a separate venire called for him and impaneled a separate jury?

The Witness: That is correct.

The Court: Very well. That is all I had.

Mr. Margolis: Just this one matter.

(Testimony of Edmund L. Smith.)

Redirect Examination

By Mr. Margolis:

Q. Mr. Smith, you ascertained during the noon recess period that the entire panel, with the exception of those who had been temporarily excused for some reason until a later date, were ordered sent into this courtroom?

A. That is correct.

The Court: That was the entire panel then?

The Witness: Yes.

The Court: Did you find that Conference of Senior Circuit Judges?

The Witness: I believe it is in this report of the committee of the conference of September, 1942.

* * *

The Court: By the way, for the benefit [192] of counsel, my Clerk, Mr. Horn, has tabulated Exhibit T, which Mr. Smith testified was all of the cards that were used or drawn on the 1946 petit jury, is that correct?

The Witness: Yes. I assume that they are all there. They haven't been checked.

The Court: The Clerk has found that there are 293 of them, 172 of them the cards indicate that that is their first service and 121 indicated previous service from which, according to the testimony up to now, the deduction would be made that 172 were submitted by the commissioner and 121 by the clerk.

(Testimony of Edmund L. Smith.)

Mr. Margolis: Not necessarily, your Honor.

The Court: I say up to the present time under the testimony as it stands.

Mr. Margolis: I think not, your Honor.

As I understand Mr. Smith's testimony, it was that the cards included some people whose names had previously been placed in the box but who had never been called to serve and also included those who had been excused from service previously.

The Court: The point I am trying to get at, that there were 172 new names that were taken by the commissioner and from fresh current new lists.

Mr. Margolis: I wonder if I could ask Mr. Smith on that?

The Court: That was his testimony. [193]

The Witness: That might be approximately true.

The Court: That these cards didn't get into the box from the lists submitted by the commissioner until after they had served, isn't that your testimony? They got into your so-called available file from which you draw your cards?

The Witness: And I also testified this morning that when sometimes the names are left in the box and were never used or drawn they get back into the available box.

Q. (By Mr. Margolis): It is also true, isn't it Mr. Smith, that those include jurors who were excused and never served, isn't that right?

A. That is correct.

(Testimony of Edmund L. Smith.)

Q. So that among the 172 names who have not had previous service there may be some whose names appear in the 25,000 or 30,000 cards who either were excused for one reason or another or whose names had not been pulled out of the box before the box was used?

A. That is possible.

The Court: There is a total of 179 that were impaneled, and the excused of course would be the difference there. But that percentage which you have just indicated in response to the questions of counsel would be a small number of the 172?

The Witness: Yes.

The Court: Very well. And of the 293 [194] cards there are only 16 upon which any occupation is indicated?

Mr. Margolis: That is why we did not use the cards, your Honor. We used the questionnaires, which are far more complete.

The Court: I know, but the card is the thing from which the jury is drawn. They are all in evidence anyhow.

Mr. Margolis: Yes.

I just wanted to clear up one thing on the last series of questions.

Q. On these 25,000 or 30,000 cards, aren't there a considerable percentage of those cards that are cards of jurors who have not served, jurors who have been excused?

A. Yes, I would say it was considerable.

A. For example, out of the 200 who were called

(Testimony of Edmund L. Smith.)

up for February 17th, all but 49 were either temporarily or permanently excused, isn't that so?

A. Well, are you talking about—I thought you were talking about the previous ones.

Q. I wanted to ask whether that was the general pattern after I had asked this question. I will withdraw the previous question.

Isn't it a fact, Mr. Smith, that generally speaking 50 per cent or more of the jurors are excused?

A. Yes.

The Court: You got 293 finally, or approximately 300, and there is 179 impaneled, so that [195] would be a little less than 50 per cent that were excused.

Q. (By Mr. Margolis): Out of the 179 there are some who may still be excused?

A. That is correct.

Mr. Margolis: This doesn't indicate the total number of excuses, this only indicates the number who were impaneled and, as I understand it, there are some who are excused even after impanelment.

The Court: They are excused during the term.

Mr. Margolis: Yes, and they may never serve, and their names may get into this list of 25,000 or 30,000.

The Court: They may serve on a trial and get excused during the term due to a death in the family.

The Witness: But if a juror had been impaneled the card would show impaneled and the date.

The Court: Yes.

(Testimony of Edmund L. Smith.)

Q. (By Mr. Margolis): Are copies of this available?

A. That is the only copy I have.

The Court: I suppose it is some place. I haven't gotten one. I don't know where to find it.

Mr. Margolis: I wonder sometime during the course of the trial—is that going in as an exhibit, your Honor? [196]

Mr. Calverley: We will offer it, your Honor, as a Government exhibit.

The Court: We will mark it and put it in evidence.

The Clerk: No. 2 for the Government.

(The document referred to was received in evidence and marked Government's Exhibit No. 2)

* * *

The Court: Let me see the accompanying letter.

It is a mimeographed letter, dated November 18, 1942, signed by Henry P. Chandler, the Director of the Administrative Offices of the Court. I will read the letter in the record.

“At the request of Judge John C. Knox, Senior Judge of the United States District Court of the Southern District of New York at New York City, I am sending you a copy of the Report to the Judicial Conference of the Committee of which he is the Chairman on the subject of Selection of Jurors. Copies of this report were sent to members of the Conference

(Testimony of Edmund L. Smith.)

and the following action in regard to it appears in the Judicial Conference report: [197]

“ ‘Jury Selection—Last year a committee of district judges, consisting of District Judges John C. Knox, Harry E. Watkins, Walter C. Lindley, Colin Neblett and James M. Proctor, was appointed to study the methods of jury selection in the Federal Courts. The committee presented to the Conference a comprehensive report recommending important changes in the mode of selecting juries, and requested that the report be distributed to all Federal judges, clerks of court, jury commissioners, and other persons interested in the subject. Accordingly the Conference directed that the committee be continued, that the report be circulated as requested, and that suggestions or criticisms concerning it be invited for submission to the committee.’

“A summary of the recommendations of the committee is found on pages 5 to 12 of the Report. Judge Knox has asked me to say that he would welcome a statement of your views regarding the Committee’s proposals. The Committee will consider the opinions which are expressed and will hereafter make a further report to the Judicial Conference.

“Yours sincerely,

“(Signed) Henry P. Chandler

“Director” [198]

* * *

(Testimony of Edmund L. Smith.)

I will hand you this book—we will mark it first.

The Clerk: Government's Exhibit No. 3.

Mr. Calverley: That is agreeable, your Honor.
We will offer it.

The Court: Very well. [200]

(The document referred to was received in evidence and marked Government's Exhibit No. 3.)

The Court: Did you ever see copies of this book?

The Witness: I have seen them but I have never known them to be used here.

The Court: You have never known them to be used?

The Witness: Except Judge Jenney might have used them at one time, but I am not positive of that, because the only ones that I ever saw were the ones that he had in his chambers. [201]

* * *

Mr. Margolis: I would like to call Mr. Brown to the stand.

The Court: Very well.

ARVIN H. BROWN,

called as a witness by and in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name?

The Witness: Arvin H. Brown.

(Testimony of Arvin H. Brown.)

Direct Examination

By Mr. Margolis:

Q. Mr. Brown, what position do you hold?

A. Jury commissioner for the United States District Court of this district, Southern District of California.

Q. For this court?

A. This court; yes.

The Court: In this Central Division?

The Witness: Yes. I didn't know that before.

The Court: There are jury commissioners in other divisions and this court goes to other divisions.

The Witness: In other words, Central Division of the Southern District.

Q. (By Mr. Margolis): Now, Mr. Brown I have before me the affidavit executed by you, dated February 17, 1947, and in which you state that you use as one source of obtaining names of prospective jurors, and I quote, "a list of registered owners of automobiles in the Los Angeles area." Where do you obtain that list?

A. There is a company that gets those out. I don't know the name of it, but it is here in Los Angeles, and I obtained some of the lists from a friend of mine who got them for me.

Q. What are these lists? Are these lists [203] of some of the registered owners or all of the registered owners?

(Testimony of Arvin H. Brown.)

A. I really don't know. They seem to get them out from time to time. I think it is some sort of a service.

Q. Do you know how many names there are on those lists?

A. No, I don't. This was some time ago that I got those. They are old lists and I really don't know how many names there are on them.

Q. How long ago did you get those lists?

A. I don't know; several years ago.

Q. Do you know whether there was a service which was prepared and offered to new car dealers or used car buyers?

A. I think it was for insurance companies, but that is just a guess of mine. You see, they want to go out and solicit the insurance from the car owners. But I would like to qualify that answer and say that I don't know that to be a fact.

Q. In other words, all you know is that it is a list of some registered owners of automobiles in the Los Angeles area?

A. That is right.

Q. You don't know how it was selected or to what extent it constitutes all of them?

A. No, I do not.

The Court: You don't know that it actually was a list, you were told it was a list by the person who gave it to you? [204]

The Witness: It was a printed list. I think it was definitely a list.

(Testimony of Arvin H. Brown.)

Q. (By Mr. Margolis): Now you refer to the fact that you obtained lists from rosters of various clubs.

A. Yes.

Q. Will you please enumerate the clubs from which you obtained lists?

A. I would like to, before I answer that question, say that this goes back, my tenure of office goes back almost 16 years, and those club rosters—and I am digging down in my memory now—were at the early period of my tenure of office, as I remember it.

The Court: How long since you resorted to club rosters?

The Witness: I would say I haven't used them since the very early period.

The Court: Have you used them during the past 10 years?

The Witness: Not to my memory.

The Court: Then I think it is immaterial.

The Witness: Wait a minute, now.

Mr. Margolis: I think not.

The Witness: Your Honor, may I correct that? I did get a list from the Friday Morning Club within the last four, five years or three or four years.

The Court: Except for that? [205]

The Witness: Except for that I can't remember any for the past 10 years.

The Court: Have you used them in the past 10 years?

The Witness: No.

(Testimony of Arvin H. Brown.)

Mr. Margolis: I want to suggest this, your Honor, the names of jurors, prospective jurors, selected from that list who either served or who were excused or whose names somehow got into the 25,000 or 30,000 cards that are being used again, therefore this evidence going back to 1925 is material because we are still drawing upon the same sources through the utilization of the 25,000 to 30,000 cards. I therefore would like to pursue this inquiry to find out what clubs and to what extent these lists were used.

The Court: Sixteen years ago would be 1930.

The Witness: 1931, your Honor, the latter part of this month. I think my affidavit tells the date, Mr. Margolis.

Mr. Margolis: February 26, 1931.

The Witness: Yes.

The Court: That was the year you did it?

The Witness: Either that or the next year, somewhere along in the very early part.

The Court: How many names did you put in?

The Witness: I can't remember.

The Court: Was it 50?

The Witness: I think it would be a few hundred from the combined two or three clubs. [206]

The Court: I don't think many of those would be left in that 25,000 or 30,000.

Q. (By Mr. Margolis): For how many years did you do this?

A. I only did that the starting period. I didn't keep doing it because I had run through them and that was all there was to it.

(Testimony of Arvin H. Brown.)

The Court: Just the one time?

The Witness: That is right.

Q. (By Mr. Margolis): You did it just for one year, is that right?

A. Either one or two years. As I say, it is so long ago I can't tell you for sure.

Q. Do you remember what the clubs were?

A. Yes.

Q. What were they?

A. Shall I answer?

The Court: Go ahead.

The Witness: The Los Angeles Country Club.

Q. (By Mr. Margolis): What kind of a club is that?

A. That is a country club where people play golf.

Q. Society club or golf club?

A. I should think so. [207]

Q. All right. Go ahead.

A. And the other one was the University Club of Los Angeles, which is on Hope Street. I don't know how to classify that, but you probably know.

Q. I think it is well known.

The Court: Well, you had better put it in the record.

The Witness: The other one was the California Club on Flower Street.

Q. (By Mr. Margolis): What kind of a club is that?

A. That is, would you call that a social club? I don't know.

(Testimony of Arvin H. Brown.)

Q. Would you say it is a club to which well-to-do people belong?

A. I wouldn't say that. I think there are well-to-do people in it, but whether it is——

Q. Would you say workers belong to that club?

A. No, I don't believe I can honestly say that, Mr. Margolis.

The Court: You mean manual workers?

Mr. Margolis: Manual workers, that is right. People who work in factories and truck drivers, people of that kind I am talking about.

The Witness: I don't whether my judgment is correct or not, but if there are people of that [208] kind in there I imagine they would be in a great minority.

Q. (By Mr. Margolis): You happen to know that they have a \$1250 initiation fee?

A. I don't, but they didn't in '31. I think you could get in—as a matter of fact, I think you could get in if you would take a membership, although I don't know that.

The Court: You could get in if you agreed to pay the dues?

The Witness: I suppose so.

Mr. Kenny: As a member of the club I will have to correct that.

The Court: It was offered to me on that basis. However, I am not testifying. And it was back in those days too. That was before I had any public office of any kind.

(Testimony of Arvin H. Brown.)

Q. (By Mr. Margolis): What others?

A. There are no others that I remember, Mr. Margolis.

Q. You referred to the Friday Morning Club. Is that a businessmen's club?

A. No, that is a women's club, the nature of which I am sorry to say I can't enlighten you on.

Q. And that Friday Morning Club, you used the last four or five years?

A. I have used that since women were taken in on the jury.

Q. That would be since 1943?

A. Whatever date that was, I have forgotten.

Q. Have you used that once or more than once?

A. Just once. And maybe I better not interject anything here, better leave it to your questions.

Q. Go ahead.

A. I was going to say it was a very small list. The Court: How many names on it?

The Witness: Well, I had less than a hundred.

Q. (By Mr. Margolis): May I ask you this? Was this a selected list given you by the club or was it the entire membership list of the club?

A. No, I solicited, I think I wrote to the president or the secretary, and asked for a list to be used for this purpose, and that was the response I got.

Q. That was what you did with the other clubs, too?

A. No. Way back in that early day the clubs published a little roster of their memberships, and I got hold of those. It is so long ago I can't re-

(Testimony of Arvin H. Brown.)

member how I selected them, but I didn't turn in the whole list, but took names out of them. Now on what basis, I don't know.

Q. Now you referred to the Southwest Blue Book. When did you use that? [210]

A. From the very early part too, and then within the last—let's see, I am trying to think—within the last three or four years, only for an area. I wanted to get some Pasadena names and I used it then. That is as I remember it.

Q. Do you know how many names you obtained from the Southwest Blue Book?

A. No, I don't.

The Court: Have you used it except for the Pasadena names within the last 10 years?

The Witness: No, I am quite sure I haven't. However, I would like to qualify that.

The Court: How many names out of that did you put in altogether?

The Witness: In both times?

The Court: No, exclusive of the Pasadena names.

The Witness: You mean way back in the early days?

The Court: Yes.

The Witness: I don't know.

The Court: Well, several hundred or several thousand?

The Witness: No, I should think there wouldn't be several thousand; I should think there would be—well, I am going to guess—along around 1500, say.

(Testimony of Arvin H. Brown.)

The Court: It wouldn't be 25,000 or 30,000?

The Witness: Oh, no. [211]

Q. (By Mr. Margolis): How many names are there in the Blue Book?

A. I don't know.

Q. What is the Southwest Blue Book?

A. I think I would call that a social register.

Q. Now you say that you have used lists furnished by labor unions.

A. That is right.

Q. What labor unions?

A. There were some of the railroad brotherhoods.

Q. When were those used?

A. Well, I can't answer because I don't remember.

Q. A long time ago?

A. Not so very long ago. I would say within the last six years.

Q. Any other unions besides the railroad brotherhoods?

A. None that I got specifically. You see these were gotten specifically but when you question me further you will probably elicit from me further sources where labor unions might naturally be included, members of labor unions, but not the unions themselves.

Q. For example, there might be members of labor unions in the telephone directory.

A. That is right.

(Testimony of Arvin H. Brown.)

Q. That is what I am not referring to. The only specific labor union lists that you have used have been lists from the railroad brotherhoods, is that right?

A. I believe that it right.

* * *

Los Angeles, California; February 19, 1947

2:00 o'Clock p.m.

* * *

Direct Examination

(Continued)

The Witness: May I give you these lists now? They are in chronological order.

The Court: Let us have the clerk mark them.

Did you want to say something?

The Witness: I would like at the present time to make some corrections in my testimony of this morning.

The Court: That is all right. We will mark these next in order.

The Clerk: For the Government? [215]

The Court: Call them 4-A, -B, -C and -D.

The Clerk: 4-A is list of 89 names delivered to clerk 2/2/43.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-A.)

(Testimony of Arvin H. Brown.)

The Clerk: List of 58 names delivered to clerk 3/16/44 will be 4-B.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-B.)

The Clerk: List of 452 names delivered to clerk 3/16/44 will be 4-C.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-C.)

The Clerk: List of 302 names delivered to clerk on 3/16/44 will be 4-D.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-D).

The Clerk: List of 27 names delivered to clerk 3/27/44 will be 4-E.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-E.)

The Clerk: List of 69 names delivered to clerk 5/17/45 will be 4-F.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-F.) [216]

The Clerk: List of 1,000 names delivered to clerk 5/17/45 will be 4-G.

(Testimony of Arvin H. Brown.)

(The document referred to was received in evidence and marked Government's Exhibit No. 4-G.)

The Clerk: List of 505 names delivered to the clerk 5/17/45 will be 4-H.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-H.)

The Clerk: List of 1175 names delivered to the clerk 5/17/45 will be 4-I.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-I.)

The Clerk: 4-J will be a list of 500 names delivered to the clerk 12/7/45.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-J.)

The Clerk: 4-K will be a list of 1,055 names delivered to the clerk 8/22/46.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-K.) [217]

* * *

Q. Perhaps I can put it this way, Mr. Brown: Exhibit P, which is in evidence, it is indicated it was put in the box on May 1, 1944. The date of delivery

(Testimony of Arvin H. Brown.)

to clerk is not shown. The first name on the list is Dorsett, and it appears to be a list of men in its entirety. You have a copy of that? Is that duplicated with those that you brought in?

A. I don't seem to have it.

The Court: That is not a duplicate, then.

Mr. Margolis: It appears not to be, your Honor.

I have arranged them in chronological order, your Honor. There is one here which indicates some names were put in the box on 7/30/45, a list which appears to be entirely of women, the first name being Mary Abascal.

Q. Is that a duplicate?

A. Yes, I have that.

Mr. Margolis: That is a duplicate, if your Honor please, of Exhibit marked 4-I. In other words, Exhibit R and 4-I appear to be duplicate copies of the same list.

The Court: Just take those that duplicates and the clerk will clip them together so we won't get them mixed up. Those two are duplicates, you say?

Mr. Margolis: Yes, they appear to be.

The Court: Let's leave these in here by this witness' exhibit numbers and use these because they are in chronological order and they will be easier to follow than the letters, so let us use them.

Mr. Margolis: We can withdraw R. I would be willing to withdraw it, your Honor.

The Court: All right. We can withdraw R.

Mr. Margolis: On the grounds that it is duplicated by 4-I.

The Court: Very well.

(Testimony of Arvin H. Brown.)

The Clerk: All the exhibits, 4-A to 4-K, are admitted in evidence, your Honor?

The Court: Yes, they are all in evidence.

The Clerk: And Exhibit R is withdrawn?

The Court: Exhibit R is a duplicate of 4-I.

Mr. Margolis: Exhibit Q, list put in the box, some of them. 3/30/45, the first name being Herbert V. Acker, seems to be a list entirely of men. That appears to be duplicated by Exhibit 4-H.

At this time I move leave to withdraw Exhibit Q on the grounds that Exhibit 4-H is a duplicate.

The Court: So ordered.

Mr. Margolis: With regard to Exhibit M, questionnaires mailed 11/8/45, the first name is Mrs. Mabel McMillan. You have handed me a duplicate, Exhibit 4-F. I move to withdraw Exhibit M on the grounds that 4-F is a duplicate.

The Court: So ordered.

Mr. Margolis: The next one, Exhibit S, questionnaires mailed 11/6/45, the first name is T. V. Cadick, appears to be a list entirely of men. Do you have a duplicate for that?

I have been handed what appears to be a duplicate, which is Exhibit 4-G. I ask leave to withdraw Exhibit S on the grounds that Exhibit 4-G is a duplicate.

The Court: So ordered.

Will you indicate that in the minutes, Mr. Clerk?

The Clerk: Yes, I am doing that, your Honor.

Mr. Margolis: Exhibit N, received 12/16/45, first name is Annabell Whittaker, and you have

(Testimony of Arvin H. Brown.)

handed me a duplicate, 4-J. I make the same motion with regard to Exhibit N on the same grounds.

The Court: So ordered.

Mr. Margolis: Now, with regard to Exhibit O, the first name is Albert Guinn, and you have handed me a duplicate, 4-K. Same motion with regard to Exhibit O and for the same reasons, your Honor.

The Court: So ordered. [221]

Mr. Margolis: The only one that appears not to be a duplicate, and perhaps we had better check that again, the first name is Dorsey.

The Witness: No, I don't seem to have it.

Mr. Margolis: Your Honor please, on examination it appears to indicate that all of the lists previously introduced through Mr. Smith, with the exception of Exhibit P, which is still in evidence, were duplicates of those which have been presented at this time by Mr. Brown marked Exhibit 4-A to 4-K, inclusive.

The Court: What is the date of that list?

Mr. Margolis: The only date that is show, your Honor, is put in box May 1, 1944. There is no indication of when questionnaires were mailed or when the list was delivered to the clerk.

The Court: Very well.

Now, Mr. Brown, are those all of the lists that you have submitted to the clerk since—what is the first date there, 1944?

The Witness: This seems to be 2/2/43.

The Court: Since February, 1943?

The Witness: So far as I could determine, your Honor, that is a fact.

(Testimony of Arvin H. Brown.)

The Court: All of the lists you have submitted and put in the box? [222]

The Witness: Yes.

The Court: Now, you said you wanted to correct your testimony, Mr. Brown.

The Witness: Yes, if I may.

The Court: Very well.

The Witness: This morning you asked me if there were any other clubs during the last 10 years that I had gotten lists from, and I mentioned the Friday Morning Club. I neglected to also say that I got a few names from the Ebell Club.

Q. (By Mr. Margolis): What kind of an organization is that?

A. That is a women's club. I think it is somewhat like the Friday Morning Club.

Q. You did that within the past few years?

A. Yes. I think the list is there and it has the date on it.

Q. Is it one of the lists which you have just presented?

A. Here it is; 3/16/44.

Q. It is list 4-B, with 58 names on it?

A. Yes.

Q. As I understand it, you asked the Ebell Club for a list of names, and this is the list that was furnished you by the Ebell Club?

A. That is correct. [223]

May I further correct my testimony? This morning we were talking about the Blue Book.

The Court: The Southwest Blue Book?

(Testimony of Arvin H. Brown.)

The Witness: The Southwest Blue Book, and I was asked if I had gotten any names from that source during the last 10 years, and I said that I had gotten some for the Pasadena area.

Mr. Margolis: That is correct. That is what you testified to.

The Witness: And when I went to get these papers that I was asked to bring in, I discovered that I had also gotten some from the Los Angeles area.

The Court: At the same time?

The Witness: I think it was.

Q. (By Mr. Margolis): Do you have that list there?

A. It is in the clerk's hands there, I think. I could identify it, I think.

Q. Perhaps we might do this, if you would start with Exhibit 4-A and tell us with regard to each list where you obtained the names, that might be a more orderly way of doing it.

A. 4-A is a list of 489 names.

The Court: And as you call the exhibit, will you give the date, please?

The Witness: February 2, 1943. There is no indication [224] where I got this list from.

Q. (By Mr. Margolis): Do you have any recollection of it?

A. But I would like to say that the best of my belief is that it is a list that I obtained just going through a telephone book.

(Testimony of Arvin H. Brown.)

Q. By the way, when you go through the telephone directory, what system, if any, do you follow?

A. I can say that I haven't any system whatsoever. I don't know of any systematized mathematical way of going through the book. I just open a page and turn a few pages and pick out names at random. I don't know who the people are. I imagine one out of many thousands I might know.

Q. Do you pay any attention to addresses?

A. No, because in many cases I don't know where the streets are.

Q. Do you pay any attention to addresses where you know where the streets are?

A. What do you mean?

Q. Are you guided in any way in your selection by that? A. Oh, no; no I wouldn't.

Q. Did you have any system of selecting a certain number from a page and then turning to another page?

A. No, I haven't any system at all. Of course, by "addresses," do you mean, for instance, sometimes I will concentrate [225] a little bit in Glendale or Beverly Hills or Pasadena or Long Beach or San Pedro, Santa Monica, but you meant street addresses, didn't you, in your question?

Q. Yes. A. No, I don't.

Q. Have you paid any attention to the names from the standpoint of nationality which might be indicated by the names? A. No.

(Testimony of Arvin H. Brown.)

Q. Do you know whether there are any names in those lists which indicate that the persons are of Spanish or Mexican origin?

A. I would think they were, but I couldn't put my finger on any of them.

Q. That is how 4-A was obtained? A. Yes.

Q. I think you have already answered the questions with regard to 4-B. Isn't that the Ebell Club list? A. Yes.

The Court: By the way, 4-A has the names of men and women.

Mr. Margolis: 4-A has the names of women only, I believe.

Q. Your list generally consists either of men or women?

A. Yes. I haven't mixed them, as I remember.

The Court: 4-A is women only?

Mr. Margolis: It appears to be, your Honor. 4-B is the Ebell list.

Q. What is 4-C?

A. Would you like the date of 4-B?

Q. Excuse me. A. It is March 16, 1944.

The Court: That 4-A was how many names?

Mr. Margolis: 4-A, your Honor, was 489.

The Court: All females?

Mr. Margolis: That is correct. And 4-B is 58 names, all females.

The Court: And the date?

Mr. Margolis: 3/16/44 delivered to clerk.

The Court: That is 4-A?

Mr. Margolis: 4-A is February 2, 1943.

(Testimony of Arvin H. Brown.)

The Court: And 4-B is what?

Mr. Margolis: 58 females, March 16, 1944.

The Court: 4-B was the Ebell Club, and 4-A is the telephone book?

Mr. Margolis: That is correct.

The Court: All right. Now, 4-C.

The Witness: 4-C is a list of 452 names of men, dated March 16, 1944, with no indication as to where they were obtained. [227]

The Court: Do you have any recollection?

The Witness: I think that I got them from the telephone book, as I got the other one.

Q. (By Mr. Margolis): That is your best recollection? A. Yes.

Q. Do you have any means of refreshing your recollection on the subject?

A. No, I haven't, I am sorry.

The Court: By the way, I think the record ought to show that the compensation that Mr. Brown gets, while it is in the statute—what is your compensation, Mr. Brown?

The Witness: Well, I get a fee every time the clerk and I meet. I imagine I average \$15 a year.

The Court: The statute limits you to \$5 a quarter, doesn't it?

The Witness: I don't know.

Mr. Smith: Not more than \$15 a quarter.

The Court: What fee do you get when you meet with the clerk?

The Witness: \$5.

The Court: Your compensation averages \$15 a year?

(Testimony of Arvin H. Brown.)

The Witness: \$15 a year.

The Court: You were allowed no stenographic help?

The Witness: No.

The Court: The government furnishes you with no office? [228]

The Witness: No.

The Court: No telephone?

The Witness: No.

The Court: No facilities of any kind or nature?

The Witness: No facilities.

The Court: Do they give you a pencil, or do you take one from the clerk's office once in awhile?

The Witness: No. I don't know whether it would be an appropriate time for me to volunteer or not, but in the beginning when I wanted to get some lists or purchase some, you know, some mailing lists from these people, various people, just on one or two occasions, with my own money, and the \$15 a year that I got I used, when I would get it, give it to the stenographer that used to type these up for me, but she is gone now and I haven't any-one.

The Court: You have to pay to have these typed up out of your own pocket?

The Witness: I haven't had any assistance since she left. She just left recently.

Mr. Margolis: It seems to me, your Honor, that this is one group that is worse off than the fishermen.

(Testimony of Arvin H. Brown.)

The Court: I think it is all material because the lower courts are charged with the duty of administering justice and we have to do it according to the cloth that is cut for us by the law, including the Appropriations Committee. [229]

Q. (By Mr. Margolis): Do you have some other employment, Mr. Brown?

A. I am glad you asked the question. In answering your question, I have to take care of this work of getting lists at odd times because I am not retired, I work for a living.

Q. What is your other employment?

A. I am in the business management field. I am a real estate broker, but I don't do very much real estate business. I am managing the business affairs of a client.

Now, I have to find time, odd times, for this work, so that is the reason sometimes my files aren't marked the way they should be.

The Court: I thought this ought to go into the record some place, so you may proceed with the interrogation on the lists, unless you have further questions.

Mr. Margolis: No, your Honor. I would like to go on with 4-D.

The Witness: 4-D is a list of 302 women dated March 16, 1944, without any indication as to the source, but on all those that are not indicated, I really believe they came from the telephone directory.

(Testimony of Arvin H. Brown.)

Q. (By Mr. Margolis): That is your best recollection?
A. That is my best recollection.

Q. How about 4-E? [230]

A. 4-E is a list of 27 women from the Friday Morning Club, dated March 27, 1944.

Q. And that list, at your request, was furnished you by that club?
A. It was; yes.

Q. And then you have 4-F?

A. 4-F is a list of 69 women from the Congress of Parents and Teachers, dated May 17, 1945.

Q. Can you tell us how you got that list?

A. I wrote for it.

Q. Who did you write to?

A. I couldn't tell you. I haven't got the letter. But I think it was—I think they call it the Tenth District, I am not sure, but I could find out, if that is an important point.

Q. That may not be necessary.

Is this the same organization as the Parent-Teacher Association?

A. Well, I kind of think it is. I think they call it the Congress—maybe that is the official name.

The Court: Known as the P.T.A.?

The Witness: Well, this is called the Congress of Parent Teachers.

The Court: You don't know whether it is the same thing as is commonly known as the P.T.A.?

The Witness: I rather think it is, but I am not so sure.

Q. (By Mr. Margolis): When you wrote and asked this Congress of Parents and Teachers to

(Testimony of Arvin H. Brown.)

furnish you with a list of names, I assume you asked for all women because the list seems to be all women?

A. I imagine I did, but I don't remember.

Q. Do you remember whether you laid any other qualifications down? A. No, I don't.

Q. You don't remember whether you did or not?

A. No, I don't.

Q. How about 4-G?

A. Wait a minute. I think I told them that I would like it exclusive of the teachers. I think I can say that. That is as I remember it. I am not quite sure, but I think I put that in. I wanted to be sure about these things. 4-G is a list of 1,000 names of men marked auto lists and telephone book, delivered May 7, 1945.

Q. What were the sources of that list?

A. The telephone directory and the list of automobile owners that I spoke to you about this morning.

Q. Do you know how many of the names on the list came from the telephone book and how many from the automobile list? [232]

A. No, I don't. I have no way of knowing that.

Q. Has your memory at all been refreshed since this morning about the type of lists, the auto lists that you used?

A. Just as I said, it is a service of some kind. I borrowed a list or two. It is a printed list. They get them out, and I think they are used for insurance agencies to go around and try to get insurance.

(Testimony of Arvin H. Brown.)

Q. Probably a list of new automobiles?

A. The list I used was an old list. Someone had used it and I borrowed it.

Q. Do you know what year the list was for?

A. No, I don't. I am sorry.

Q. You don't have the list any more?

A. I don't believe I can find it.

Q. Now, 4-H, Mr. Brown.

A. 4-H is a list of 505 names of men from the Southwest Blue Book. Your Honor, I haven't got the Southwest written on here.

The Court: Is there any other blue book?

The Witness: Not that I know of.

Mr. Margolis: There are several blue books, your Honor.

The Witness: Shall I write "Southwest" in there?

The Court: No.

The Witness: This was delivered on May 17, 1945. [233]

The Court: That is the sort of social register that you were talking about?

The Witness: Yes.

* * *

The Witness: I just want to emphasize that these names were taken from the Blue Book and did not include the entire list of the Blue Book.

The Court: This was mostly Pasadena.

The Witness: Wait a minute. No, this was—which one have you got there?—yes, in the Pasadena area, San Marino, Flintridge, and all those communities. [234]

(Testimony of Arvin H. Brown.)

The Court: Why did you choose some from Pasadena?

The Witness: I thought perhaps we should put into the list people from that area.

The Court: From that area?

The Witness: Yes.

The Court: You mean that the lists were deficient in that respect?

The Witness: No. This was a list of women, wasn't it?

The Court: You said 505 men.

The Witness: I did?

Mr. Margolis: Yes, it is 505 men.

The Court: Why did you pick the Blue Book?

The Witness: Just as a source. I couldn't give you any reason. I had to pick some source, and that seemed to be a good one.

The Court: You mean a source of persons who, if listed, would likely be not incompetent to act as jurors?

The Witness: I did not have that in mind, sir.

Q. (By Mr. Margolis): I think we are down to 4-I now.

A. 4-I is a list of 1175 women from the Southwest Blue Book, delivered May 17, 1945, and that is from Los Angeles, isn't it?

Mr. Margolis: There seems to be a lot of Beverly Hills addresses on here. Here is the way it goes: Los Angeles, West Los Angeles, Los Angeles, Bel Air, Beverly Hills, Los [235] Angeles, Beverly Hills, and so forth.

(Testimony of Arvin H. Brown.)

The Witness: Well, it is all around, then.

Mr. Margolis: Yes, it seems to cover quite a territory. I would say about one-third was Beverly Hills, just looking at it quickly.

Q. How about 4-J?

A. 4-J is a list of 500 women delivered to the clerk on December 7, 1945, and I have marked it "Various," which indicates to me that it was from the telephone directory. That is the way I sometimes marked it.

Q. It wouldn't mean various sources?

A. No.

Q. Selected at random in the way you have indicated?

A. Yes, that is right.

Q. 4-K?

A. 4-K is a list of 1055 men delivered August 23, 1946, without indication of the source, but I would like to testify as I did previously about similar lists that had no indication on them.

Q. In other words, from the telephone book?

A. That is the best of my belief.

Q. Now, Exhibit P, of which you appear not to have a copy——

The Court: What date is that?

Mr. Margolis: The only date we have on Exhibit P is that [236] it was put in the box May 1, 1944. We have no indication of when the list was delivered to the clerk or whether, in fact, it was delivered to the clerk.

The Court: The clerk produced that?

(Testimony of Arvin H. Brown.)

Mr. Margolis: Yes, the clerk produced that, but there is no indication on here as to where it came from.

The Witness: I can't identify that list.

Mr. Margolis: You can't identify this list?

The Witness: Yes.

The Court: How many names are on it? The clerk testified that Mr. Brown gave him that list.

Mr. Margolis: There are a lot of names on here.

The Court: Isn't there a number on it?

Mr. Margolis: No, your Honor. There appear to be 30 pages, or, rather, 30 names per page, and there are 36 pages, which would indicate about 1080, if my multiplication is correct.

The Court: Men or women, or men and women?

Mr. Margolis: They appear to be all men, your Honor, without checking each name, just a spot check.

The Court: You don't recognize the list at all?

The Witness: Your Honor, I really think it is my list, but there is nothing on it to indicate where I got it, whether it is from the telephone book or whatnot. I think it is the telephone book. [237]

The Court: Very well.

Q. (By Mr. Margolis): None of those lists that you turned over are lists that you obtained from any union, is that right? A. No.

Q. Were the union lists used prior to 1943?

A. Yes.

Q. Do you remember when?

A. I don't; no.

(Testimony of Arvin H. Brown.)

Q. Do you have those lists?

A. I haven't them; no. They were just a few names, though, as I remember.

Q. Now, in your affidavit you refer to the use of assessment lists. Where did you obtain those lists?

A. Well, that was a list that I used in the very early days of my work here, and my recollection is that someone had a list and allowed me to use it, a list of personal property people who had paid assessments on personal property. It is so far back that I don't recall the nature of the list, or much about it, or how many names were on it.

Q. Or how many names you obtained from that?

A. That is right.

Q. In your affidavit you refer to lists from the Parent-Teachers Association. Was that with reference to the list from the Congress of Parents and Teachers? [238]

A. That is right.

Q. That is what you intended by it?

A. Yes.

Q. Were there any lists from the Parents-Teachers Association?

A. Not that I got lists from.

Q. You also referred in your affidavit to a list of colored people obtained from a colored minister residing in Los Angeles.

A. That is right.

Q. Who was this colored minister?

A. He was a man named Collins, C-o-l-l-i-n-s.

Q. Where was his church located?

A. His church was on the corner of East Eighth Street and Towne Avenue, as I remember it.

(Testimony of Arvin H. Brown.)

Q. You just happened to meet him and asked him for a list, is that right?

A. I went to a wedding there and so it occurred to me, I wanted to get some names, so I looked him up, I thought he was a very nice sort of a person and thought perhaps he could furnish me with a list. I didn't know where to get those kind of names. As I have testified before, I am sort of hampered, so I thought that that would be a good source, and I went to see him and he did get me a list. It wasn't a large list, but I put it in the box, or, rather, I gave it to the clerk. [239] It must have been four, five, six years ago.

Q. Just the one list you obtained from him, is that right?

A. That is correct.

Q. Did you tell him what kind of people you wanted on the list?

A. No, no.

Q. Just that you wanted some colored people?

A. I just wanted a list of people. I told him the purpose that I wanted it for.

The Court: To serve on a jury?

The Witness: That is right. But I didn't indicate to him to get—well, I wouldn't know how to classify them, would I?

Q. (By Mr. Margolis): You just said you wanted colored people to serve on the jury?

A. That is correct.

Q. Did you ever obtain a list, say, from a Catholic priest in the area in which a large number of Mexican-Americans resided?

A. I never have; no.

(Testimony of Arvin H. Brown.)

The Court: Do you know of any organization which is composed exclusively of Mexicans?

The Witness: Were you addressing me, sir?

The Court: Yes. [240]

The Witness: No, I don't.

The Court: Did you know where to go to get a list of Mexicans who were citizens and otherwise likely to be qualified?

The Witness: No, I wouldn't.

The Court: Would you know where to go to get a list of Negroes?

The Witness: No, I wouldn't.

The Court: Would you know where to go to get a list of any of the other nationalities or races, Japanese or Negroes or Chinese who were born in the United States?

The Witness: Well, Japanese, I just got a list a few months ago from a minister.

The Court: Did you give that to the clerk?

The Witness: No. I don't know why I didn't bring that in.

The Court: You have another list of Japanese?

The Witness: I don't know whether it was during this period or not, but I didn't run into it in my files. You know, my files aren't what they should be. But I did get a list.

The Court: Do you have that list, Mr. Smith?

Mr. Smith: I think so.

The Court: Will you get it? [241]

(Testimony of Arvin H. Brown.)

Q. (By Mr. Kenny): I am going to ask you, Mr. Brown, on 4-A, 4-B, 4-D and 4-E, how many addresses you find there that are south of Pico and east of Hoover Streets? I think the Court would take judicial notice that that would exclude the Wilshire, Beverly Hills and Hollywood areas.

The Court: South of Pico and east of Hoover? That includes the Wilshire district.

Mr. Kenny: No, I am excluding them.

The Court: It is exclusive of the Wilshire area, then?

Mr. Kenny: I would say so. Once you get south of Pico you are out of the Wilshire area.

The Court: How about West Adams?

Mr. Kenny: I am being very generous for the purpose of this question.

The Court: On West Adams there are very fine homes, and there are a large number of colored people living there, also south of Normandie and also in Sawtelle and now in Hollywood.

Mr. Kenny: My question was, how many—I don't think there are any from a cursory inspection—but if there are any in those lists, 4-A, 4-B, 4-D or 4-E, that are residents [242] south of Pico or east of Hoover.

The Court: Do you want him to take the time to go through all those lists right now?

Mr. Kenny: I want to know if he could point out one.

The Court: The lists are there. I think that is more a matter of argument, don't you, Mr. Kenny.

(Testimony of Arvin H. Brown.)

Let me ask him this question: In gathering the lists from the telephone directory or any directory, did you exclude anybody by virtue of the fact that they lived south of Pico and east of Hoover?

The Witness: No, because I think you will find—I don't know whether you will find them on these lists or not—but I think you will find them on other lists. I didn't intentionally do it.

The Court: You didn't intentionally exclude them?

The Witness: No.

The Court: If you did, it was by chance?

The Witness: That was the only way I could account for it.

The Court: Did you intentionally exclude anybody from any area?

The Witness: No. [243]

* * *

Mr. Kenny: The witness testified that there were names of Spanish or Mexican origin on 4-A, 4-B, 4-C, 4-D, 4-E, 4-F or 4-G.

Q. Can you point out to me one name of a Spanish or Mexican or Italian origin?

Mr. Calverley: That is objected to, your Honor, as argumentative. The lists speak for themselves. That is arguing with the witness. I object to it on that ground.

The Court: I don't know, counsel, whether that is argument or not. There are some Spanish names, or some names that I, or any person, can recognize as of Spanish origin. There are many others that I can't. Also many people change their names.

(Testimony of Arvin H. Brown.)

Mr. Kenny: That is right. But my examination of that list, I find plenty of Spanish names, but they are street names. There are plenty of San Pasquel Streets, but I could [244] not find, and I asked the witness if he could explain or point out, a single Spanish or Mexican or Italian name in any of those lists.

The Court: I think the lists speak for themselves. I think it should be followed by this question: Did you, in selecting the names from the telephone directory, give any consideration to the kind or type of name it was?

The Witness: I didn't consciously. I might have, but not consciously. I didn't systematically go about to exclude anybody.

The Court: That is, as to the type of name, somebody whose name was Cohen or Smith or Marino or Allegretti—I suppose those are Italian names, I don't know.

Mr. Kenny: Allegretti would be one.

The Witness: But, your Honor, take the list of women, for instance, you couldn't tell from their names what origin they were because of marriage. They might be a Spanish senorita that was married, and if I went about trying to exclude her I would be defeated right at the start, wouldn't I?

Q. (By Mr. Kenny): Is it possible, Mr. Brown, that you selected those names, that it, in 4-A, that were selected from the telephone book which, as I say my observation shows that they are all in this geographical area I have described, that you sel-

(Testimony of Arvin H. Brown.)

ected them by the prefixes, such as Hollywood or Gladstone or Granite prefixes of the telephone number? [245] A. No. [246]

* * *

Mr. Margolis: * * * We have here now the Southwest Blue Book.

The Court: Is it published annually?

Mr. Kenny: Yes.

The Court: What year is that for?

Mr. Margolis: 1947.

* * *

Mr. Margolis: We will offer that in evidence, your Honor please.

The Clerk: U in evidence.

(The volume was received in evidence and marked Defendants' Exhibit U.)

Q. (By Mr. Margolis): I might ask the witness whether this is the publication which he had reference to when he referred to the Southwest Blue Book? [249] A. (Examining book.)

The Court: This is for 1947.

Mr. Margolis: Yes, but I mean for other years.

The Witness: Yes, that is right, but it wasn't 1947.

The Court: It was the previous year?

The Witness: It must have been a previous year.

The Court: But it was a book published by the same people?

The Witness: By the same people.

(Testimony of Arvin H. Brown.)

Q. (By Mr. Margolis): And having the same title except that the year is different?

A. That is right.

* * *

The Court: Proem—I suppose that means preface, I don't know.

“With an unbroken record of 43 annual editions as its background, the Southwest Blue Book for 1947 adds still another to the long series. We believe the 1947 issue will sustain this publication's reputation as the standard society register of Southern California, the book having been carefully revised and brought down to date. The listing [250] of many eligible newcomers has augmented the already large roster of older first families; there are special sections devoted to the year's marriages, clubs and other features while an unusually large number of address and telephone changes will be noted. The editor wishes to thank her many patrons for ready cooperation which has greatly lengthened the work of compiling.

“Sincerely,

“LENORA KING BERRY,

“Editor and Publisher.”

* * *

The Court: Very well. First, I would like to ask this witness this question: Except for 4-H and 4-I, which are the two lists you have indicated you took from the Southwest Blue Book, how many

(Testimony of Arvin H. Brown.)

times since you have been Jury Commissioner in the last 16 years have you submitted names from that book?

The Witness: Just once before, in the very beginning.

The Court: About how many names? [251]

The Witness: Well, I couldn't remember, but it was just a few hundred, I think. I believe I was asked this morning, but I am not sure about that.

The Court: Let me ask you another question: Since you have been Jury Commissioner, can you give an estimate of the total number of names that you have submitted?

The Witness: I haven't any accurate statistics. I don't know what is proper in a proceeding of this kind, how accurate I should be.

The Court: Well, your best recollection, if you can give me one.

The Witness: I think it would be, that I would say between 20,000 and 24,000 names.

The Court: 20,000 to 24,000 names?

The Witness: Somewhere along there, to the best of my estimation.

The Court: Well, in these years that you have given us, 1944, 1945 and 1946—that is three years—you have submitted 6500 names? That is about 2,000 names a year. Is that about the number that you submitted during the last 16 years?

The Witness: Well, that would bring it to 32,000, and it could be that many, but I don't like to testify to that.

(Testimony of Arvin H. Brown.)

The Court: Are these typical years, approximately? It doesn't have to be accurate. Are they approximately typical in number of names submitted? [252]

The Witness: Well, I would rather say the average was 1500.

The Court: 1500 a year for the past 16 years?

The Witness: Yes. That would be 24,000, wouldn't it?

The Court: Yes, about that. About 24,000 total, then, you have submitted.

Of those names, do you have any idea how many of those have gone into what you heard the clerk describe as his available box?

The Witness: I wouldn't have any way of knowing that, your Honor.

The Court: Very well. Now, the course that you have followed, with the exceptions you have indicated, as your method of selecting names during that period, has that been typical of these three years?

The Witness: I don't believe I understand the question, the course that I followed?

The Court: In getting names. You said that you had gotten some from a colored church, that you had gotten some from a Japanese church, that you had gotten these two lists on May 17, 1945, from the Southwest Blue Book, that you did it once before, you took the California Club one year and the Los Angeles Country Club, otherwise have you followed the course that you generally described in getting the 24,000 names?

(Testimony of Arvin H. Brown.)

The Witness: Yes, I think I could say that.

The Court: Proceed.

Q. (By Mr. Garrett): Your name is Arvin Harrington Brown, Jr., isn't it?

A. No. That is my son.

Q. Is he related to you?

A. He is my son; yes.

Q. And you are Mr. Arvin Harrington Brown, Sr., is that correct? A. That is correct.

Q. You are residing at 2071 South Hobart Boulevard, is that correct? A. That is correct.

Q. I am reading from the Southwest Blue Book.

A. Yes.

Q. Are you a subscriber to this publication?

A. My wife is, yes. [254]

* * *

Q. Mr. Brown, are you a member of the California Club? A. No, sir.

Q. You mentioned using one of their lists.

A. Yes.

Q. That was prior?

A. That was way back in the very beginning. That must have been back about 1931 or '32—pardon me, I was a member at that time. That is how I got the roster.

Q. How did you get the list, if you recall, from the Railroad Brotherhoods to which you have referred?

A. By correspondence. I wrote to them.

Q. Did you write to someone you knew?

A. No.

(Testimony of Arvin H. Brown.)

Q. Do you remember which one of the Railroad Brotherhoods you wrote to?

A. No, I don't, but there were several of them.

The Court: That is, you wrote to several?

The Witness: I wrote to several.

Q. (By Mr. Garrett): Were they located here?

A. In Los Angeles.

Q. About how long ago was that?

A. I think it was about five or six years ago.

Q. You don't recall which one of the Brotherhoods it [258] was which furnished you the list?

A. There were several. They sent a very few names, and I didn't—this is from memory and I can't be sure about it—but I believe that one or two didn't respond at all.

Q. Do you recall what you did with those names that were so supplied?

A. I gave them to the clerk.

The Court: That was when? You testified this morning, but I have forgotten.

The Witness: I think five or six years ago, to the best of my recollection.

Q. (By Mr. Garrett): Do you recall seeing any of those names there after you gave them to the clerk?

A. I wouldn't recognize them if I saw them.

Q. You spoke of the Los Angeles Country Club list which was used. Are you a member of that Club? A. No.

Q. Or have you been?

(Testimony of Arvin H. Brown.)

A. Well, yes, I was once, but it was long prior to this, long prior to my coming in as Jury Commissioner.

Q. And you obtained that list as a former member, I take it, of the club?

A. I don't know whether I borrowed it from some member or not. I think that is the way I got it. I don't think they would give a former member a list. [259]

Q. You mentioned a list from the University Club. Are you a member of that club?

A. No.

Q. When that list was obtained, did you obtain it as a member or a former member at that time?

A. I must have borrowed it.

Q. From some friend who was a member?

A. Yes.

Q. When you obtained this list of names from the Friday Morning Club, did you get that from a member or from a friend who was a member?

A. I wrote to someone, whom I didn't even know, one of the officers—I think it was the president, I am not sure, or the secretary.

Q. Is your wife a member of that club?

A. No.

Q. Or any of the members of your family?

A. No.

Q. Now, with respect to the other women's club, the Ebell Club, did you write for that list?

A. Yes.

(Testimony of Arvin H. Brown.)

Q. Are you acquainted with the addressee of your letter, or did you just write generally to the club? A. I just wrote to the club.

Q. Are any of the women folks in your family members of [260] that club? A. No. [261]

* * *

Q. (By Mr. Garrett): This is what I want to ask you, Mr. Brown: In going through a phone book or any list, certain names catch our attention because they are names that are familiar to us, names of persons we know, or apparently the names of families which we know. Have you, to some extent, do you think, been guided by that sense of recognition in making your check of, say, phone books and selecting names? Have you looked for names that were familiar to you?

A. No, not consciously because I wouldn't know that many names. You see what I mean, I have turned in thousands of names and I wouldn't know.

* * *

Q. (By Mr. Garrett): Now, you spoke about a list or lists which do not appear here. Have you submitted any other lists beyond these in evidence that you can recall in this year 1947?

A. No.

The Court: Before recess there was another list that you said you had submitted and Mr. Smith said he had it.

Mr. Calverley: I have it. [272]

The Court: Show it to the witness.

(Testimony of Arvin H. Brown.)

Voir Dire Examination

By Mr. Calverley:

Q. Mr. Brown, I will show you a list of 24 names with the notation at the bottom, "Mailed questionnaires 12/24/46." Do you recognize that?

A. Yes, I recognize that list.

Q. What is it?

A. That is a list of Japanese that I obtained, as testified to previously.

Q. Did you prepare this list?

A. Yes, I prepared that list.

Q. What did you do with it?

A. I gave it to the clerk.

Q. When did you give it to the clerk, as best you recall?

A. I thought it was within the last six or eight months, but I can't tell for sure.

Mr. Calverley: We will offer this list, your Honor, as government's exhibit next in order.

The Court: We will give it the number 4-L.

Mr. Garrett: Is that offered in evidence?

Mr. Calverley: It is.

Mr. Garrett: I will object to it on the ground that it does not appear relevant, in view of the fact that it has not [273] been used, nor have apparently the questionnaires been sent on it. There is no way that we can tell if it has been used.

The Court: It is admitted. He testified he submitted it to the clerk. It is admitted in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-L.)

(Testimony of Arvin H. Brown.)

The Court: How many names on it?

The Clerk: 24.

The Court: All men or women, or can you tell from reading the Japanese names?

The Clerk: They all look like men, your Honor—no, there is one Mrs. Alice something.

The Witness: I thought there were some women on there.

The Court: Can you tell?

The Witness: Not by reading the names, no.

The Court: Let me see it.

(The document referred to was passed to the Court.)

The Court: It appears to be men and women. I see Mrs. K. Iseri, and Miss June Murakami, and Miss Ryo Kashiwagi, and Mrs. Mabel Ota, and Mrs. Alice Jino, Mrs. Eddie Imazu—it appears to be equally divided. It is dated on or about 12/24/46.

Where did you get those names?

The Witness: I got those from a Japanese minister, preacher. [274]

The Court: All right, Mr. Garrett. Go ahead.

Q. (By Mr. Garrett): Are there any other lists which you have submitted but which have not yet been used?

A. You mean that I have submitted to the clerk?

Q. Yes, that is, within this year 1947.

A. And haven't been used?

Q. That is correct.

A. I wouldn't know if I submitted them to the clerk.

(Testimony of Arvin H. Brown.)

Q. Have you submitted any others besides this 4-L which has not been produced here in the year 1947?

A. I haven't produced any in 1947. I haven't submitted any to the clerk.

Q. When was this last list, which is now known as 4-L, when was it submitted?

A. Was this the Japanese list?

Q. Yes.

A. I haven't got the exact date for that, but I think it was just a limited number of months ago.

The Court: It says on this statement here, "Mailed questionnaires 12/24/46, and placed in box 1/2/47," so I guess they are in the master box. We will have the clerk explain that later on.

Incidentally, the Japanese list has 12 men and 12 women, or at least 12 people whose names begin with Mr. and 12 whose names begin with Miss or Mrs. [275]

Mr. Garrett: Yes, I recognize the fourth name on that list, I believe.

Q. May I ask, with respect to this list of Japanese names, Mr. Brown, what you did in connection with that list beyond delivering it to the clerk?

A. What I did with it?

Q. Did you send it to the clerk?

A. I either sent it or probably brought it up and gave it to him.

Q. And you turned it over to him, did you?

A. Yes.

(Testimony of Arvin H. Brown.)

Q. Have you ever seen the list since?

A. Not until——

Q. Until today? A. Until today.

Q. Have you ever seen any of the names on that list in any other form, that is, on cards or on questionnaires or anything since the time that you submitted it to the clerk?

A. Well, if they are in the master box, I certainly have.

Q. But that fact, that they are said to be in the master box, is the only recollection you have on that subject, is it?

A. I wouldn't attempt to remember the names as we put them in, but I know I was there because we put them in together, and I must have seen those names. [276]

Q. That is directly from the list which you submitted? A. I beg your pardon?

Q. You submitted the list? A. Yes.

Q. To the clerk? A. Yes.

Q. Were the names put in the box at the same time?

A. Oh, no. You mean on the same day?

Q. Yes.

A. Oh, no. I could not tell you when, but they have to send out questionnaires first.

Q. Now, in all the cases of the selections from the telephone book, can you recall this, Mr. Brown: Do you recall whether or not you transcribed those names that were selected in your own handwriting.

(Testimony of Arvin H. Brown.)

or just how they were transferred to the lists which you submitted to the clerk?

A. I wrote them down and then had them typed.

Q. Now, with respect to the placing of the names in the box, Mr. Brown, what procedure did you follow in that respect, that is, with respect to placing the names in the box?

A. In the master box?

Q. Yes.

The Court: Which box, the available box or the master box?

Mr. Garrett: The master box. [277]

The Witness: Well, the tickets have already been made—I think that is the name that we talked about—which have nothing on them excepting the name. There is no address or any other information. It is a little narrow ticket. The clerk generally sends for me, or always sends for me, when it is time to put names in the box. When I get there he has the tickets all ready in bunches and when we are ready to put the tickets into the box we each take a portion of them and then alternately—I don't know which one begins first—reads the name and drops the ticket in the box. We will say the clerk starts first. Then I will read the next name and put it in the box, and so on, until those names are all placed in the box.

Q. (By Mr. Garrett): Now, when the name is read, is it read from the ticket? A. Yes.

Q. At the time this placing in the box takes place, do you have the questionnaires there also, or merely the tickets?

(Testimony of Arvin H. Brown.)

A. Well, whether the questionnaires are in the room or not, I don't know.

Q. I mean there at the point where this deposit is being made, do you have the questionnaires there?

A. You mean so we can look at them while we put the tickets in? [278]

Q. That is correct, so you can refer to them if any question arises.

A. No. I can clarify that by saying when we put the tickets in the box the only information that we have is the name on the ticket. Is that what you mean?

Q. That is correct.

The Court: You don't have the cards available or the questionnaires, or anything else?

The Witness: If they are there, we don't look at them. I don't know where they are.

Q. (By Mr. Garrett): If any question arises as to any name about putting it in the box, you then go to other records in order to check up on that name?

A. Well, I don't know what question you mean that might arise. You mean like if a person was dead?

Q. I case one or the other of you thought that there was some reason for not putting a name in the box, would there be any documents there that you could check on with respect to that name?

A. Well, the clerk could look it up on the cards.

The Court: Do you ever have any question when you go to that stage?

(Testimony of Arvin H. Brown.)

The Witness: Once in a while, but very, very seldom we would recognize the name of someone who has died.

Q. (By Mr. Garrett): With respect to the handling of [279] these questionnaires, you don't have anything to do with that, do you, Mr. Brown?

A. You mean sending them out?

Q. Sending them out or reviewing them after they are returned?

A. Yes, when they come back the clerk sends for me and we look them over.

Q. You look them over with him, is that so?

A. Yes, that is right.

Q. Thereafter do you have occasion to see those questionnaires again at any time before the time that the slips that have been typed up, or tickets, are placed in the box?

A. I suppose they would be available to me, but I never have inspected them.

Mr. Garrett: That is all.

The Court: Is there anybody else on this side of the table who wants to question the witness?

Mr. Margolis: No questions.

The Court: All right, Mr. Calverley.

Cross-Examination

By Mr. Calverley:

Q. Mr. Brown, do you have any particular motive in performing the services as Jury Commissioner which you performed during the past 16 years for the sum of approximately \$15 a year?

(Testimony of Arvin H. Brown.)

A. Well, I only considered it a patriotic duty. I don't know whether "patriotic" is the right word or not. Maybe it is "civic." But it was something that I wanted to contribute, and that could be the only possible motive. I don't know what you mean by "motive."

Q. Do you gain anything at all as a result of your service as Jury Commissioner from a material standpoint except the \$15 a year you receive, or approximately that?

A. I will say for accuracy that I haven't gained that because I used to give that to the young lady who typed the lists. I am not complaining, but I am out of pocket because in the early days I purchased lists with my own money, so I haven't gained anything.

Q. Is that true during all the 16 years of your service? A. Yes, that is true.

Q. Have you used the Los Angeles extended area telephone directory continuously since the beginning of your service as a source for prospective jurors?

A. No, I can't say that I have from the very beginning.

Q. When did you start using it, as best you recall?

A. I am sorry to say I can't tell you, but I think it was quite a number of years ago.

Q. Have you, Mr. Brown, ever intentionally and systematically discriminated against any individuals whose names you placed [281] on any of the prospective juror lists on the ground that he was a laborer working for wages by the day?

(Testimony of Arvin H. Brown.)

The Court: Or hour.

Mr. Calverley: Or hour.

The Witness: Never.

The Court: Have you ever left any name off on any ground of occupation or pay or rate of pay or time of pay, or whether they were paid at night or by the hour or by the day or by the week or by the month? Have you ever left any name off on that account?

The Witness: Never.

The Court: Have you any way of knowing whether or not a man's name in the telephone directory, or any of these other places, whether or not they are paid by the day or hour or if they are paid at all?

The Witness: I have no way of knowing.

Q. (By Mr. Calverley): Have you ever left any man's name or anyone's name off the list on the basis of his or her race? A. No.

Q. Have you ever left the names of any prospective jurors off the list because they were businessmen or independent businessmen? A. No.

The Court: Or employees of corporations?

The Witness: I wouldn't know.

The Court: Or labor unions?

The Witness: You see, in these telephone books I wouldn't know who they were.

Q. (By Mr. Calverley): Have you ever followed any standard of discrimination against prospective jurors on the basis of their occupation or the way they earn their living? A. Never.

(Testimony of Arvin H. Brown.)

Mr. Calverley: That is all, your Honor.

The Court: Any other questions?

Mr. Margolis: No further questions.

Mr. Calverley: Just one other, if the Court please.

Q. Mr. Brown, you served as Jury Commissioner during the term of office when Mr. R. S. Zimmerman was clerk of this court, is that right.

A. Yes.

Q. Did you ever see any list of names in the possession of Mr. Zimmerman or of any discussion with him that had been obtained from the Central Labor Council?

A. Well, I haven't anything but a vague impression about that, that he had obtained some names.

Now, I want to be specific. When you asked me previously if I was Jury Commissioner during his term, that is not quite accurate, because he was clerk, I don't know how long before I came in as Jury Commissioner. [283]

The Court: He was clerk part of the time?

The Witness: That is right. But during the last part of his term I was Jury Commissioner.

I have a faint recollection, but I couldn't testify to anything definitely in a definite way, about that.

The Court: What is your best recollection?

The Witness: Well, my best recollection is that he had obtained some names from the Labor Temple.

Q. (By Mr. Calverley): Is that the Labor Temple in Los Angeles?

(Testimony of Arvin H. Brown.)

A. I don't know. I should think it would be.

Q. Mr. Zimmerman is now deceased, you know that, do you not? A. Yes.

Q. Do you recall the date of his passing?

A. No, I don't.

Q. It was prior to 1942, is that true?

A. I should think so.

Mr. Calverley: That is all, your Honor.

* * *

WILLIAM S. ROBINSON

called as a witness by and in behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: William S. Robinson; R-o-b-i-n-s-o-n.

The Clerk: And your address?

The Witness: 2736 Tilden Avenue.

Direct Examination

By Mr. Margolis:

Q. Dr. Robinson, what is your business or occupation?

A. I am Assistant Professor of Sociology at the University of California at Los Angeles.

Q. How long have you been at the University of California? A. Four months.

Q. In that capacity? A. Yes.

Q. What education have you had, Doctor?

A. I have an A.B., M.A. and Ph.D.

(Testimony of William S. Robinson.)

Q. In what subjects?

A. My A.B. was in English, my M.A. was in Sociology, and my Ph.D. was in sociology and statistics.

The Court: Where?

The Witness: Columbia University.

Q. (By Mr. Margolis): Your Ph.D. is in sociology? A. Yes.

Q. And statistics? A. That is right.

The Court: Where was your A.B. from?

The Witness: My A.B. was from the University of California, and my M.A. and Ph.D. from Columbia University.

Q. (By Mr. Margolis): What work have you done in the statistical field?

A. Until this summer I was Assistant Professor of Statistics and Sociology in the graduate faculty of Columbia where I taught statistics for one thing.

Q. For how long did you hold that position?

A. For eight years.

Q. Go on.

A. And my statistical work, in the main, has been——

* * *

My statistical work outside of teaching has come, in the [286] main, from two things: I was chief statistician of the Columbia office of Radio Research, now called the Bureau of Applied Social Reference, for some seven years. The rest of it has been as consultant.

(Testimony of William S. Robinson.)

Q. (By Mr. Margolis): Before you go on with the consultant phase, will you tell us the nature of your work in charge of that department, or assistant in charge of that department?

A. Yes. It consisted in supervising all the statistical work of the Office of Radio Research, the planning of studies through their prosecution to the analysis of the data and writing of reports.

Q. Can you give us the nature of statistics that you dealt with? Did you deal with statistics dealing with people?

A. Of all sorts. In my period we were mainly doing war research, with a contractual arrangement with the Bureau of Census, the Office of War Information, etc. So I handled a variety of statistics, whatever I was given to deal with.

Q. Give us some examples.

A. One of the things we did was to prepare tests for foreign language propaganda broadcasts for the foreign division of the OWI, the major problem being to take a canned broadcast and give it to a foreign language group in this country and from their reactions redesign it so as to do a better job before it was finally broadcast to a foreign [287] country.

Q. That was determined on a statistical basis?

A. Yes. The major problems involved were those of designing an experiment to carry out a given purpose, devising scales to quantitatively record the reactions of individuals, devising tests of significance to determine their likelihood of occurring again. It was mostly mathematical problems.

(Testimony of William S. Robinson.)

Q. Now, you say you have acted as consultant with relation to certain statistical jobs or problems?

A. Yes.

Q. Give us some examples of that.

A. You mean the names of people for whom I have worked?

Q. Names of people, nature of jobs, and so forth.

A. Columbia Broadcasting System, National Broadcasting Company, the Princeton Radio Research Project, Rockefeller Foundation, E. I. de Nemours Dupont & Company, Time Magazine, Fortune Magazine, more particularly the Fortune Poll, War Production Board, Army Service of Supply, Office of War Information, United States Bureau of Census—that is all.

Q. Can you tell us some of these projects on which you were consulted, as to what they related to?

A. I was consulted by the Dupont Corporation as to whom to give slips to test so they could guarantee so many washings. [288]

The Court: So many washings?

The Witness: Yes.

The Court: You mean like Duz, soap, you mean?

The Witness: Exactly. The Dupont Corporation will guarantee to manufacturers that a slip of a certain variety will, let us say, stand 47 washings by a laundry.

The Court: Slip?

The Witness: A woman's slip. And the way they determine that is to give, say, 5,000 slips to

(Testimony of William S. Robinson.)

their employees scattered over the country and have them wear them and wash them. They were spending about \$60,000, as I remember, for determining this for each model, and they wanted to know how to do it more cheaply. It was a problem of how to pick people and kinds of washings, and so forth, so as to get the indication of the effect with the smallest number of slips.

I mention that to be facetious, since it is of no particular importance.

Then for the Bureau of the Census, for example, I worked during the war on a sample census of the United States to collect information of use to the war effort.

For the War Production Board I worked on a special cross-section sample of the United States for determining the needs of consumers during the war, determining the sort of things that caused most of their gripes, let's say.

Q. (By Mr. Margolis): I wonder if you can turn now to [289] the Fortune Poll?

A. I was consultant to Elmo Roper, who is the director of the Fortune Poll, in the sampling techniques, mathematics. If he had a special or particular problem out of the ordinary run, he would ask me, that is, involving knowledge of mathematical sampling procedure, he might consult with me as to that.

The Court: What do you call mathematical sampling procedure?

The Witness: Discussions such as I have heard here of random selection from telephone books.

(Testimony of William S. Robinson.)

The Court: What did you do?

The Witness: I will give you one example.

The Court: What is this phrase you used? It has escaped me.

The Witness: Randon?

The Court: No.

The Witness: Mathematical sampling techniques?

The Court: Yes, mathematical sampling techniques.

The Witness: Perhaps I can give you a rough idea of it by giving you a specific example.

In the 1940 election, Life Magazine decided to study the election, so to speak, as to the casual factors involved. They hired the Office of Radio Research to do the job. They picked Erie County on which to do the job. They hired Elmo [290] Roper and his interviewers to do the interviewing in the field in Erie County during the election campaign. Mr. Roper knows very well how to select samples on a nation-wide basis, but he didn't know how to select a sample from a county of some 30,000 or 40,000 people. So he asked me how to do it. You don't do it in the accustomed way, you don't do it in the way you select samples on a nation-wide basis.

Q. (By Mr. Margolis): Perhaps you should tell us what you did.

The Court: That is what I am trying to get at, what you did to accomplish this with the mathematical sampling technique.

The Witness: My functions, just to speak——

The Court: In that one case?

(Testimony of William S. Robinson.)

The Witness: I will tell you, but I would like to preface it so you will know what I am talking about.

My function is to see that the way a sample is taken corresponds to the mathematical sampling technique. The purpose of a statistician is to tell anyone who wants to take a sample how to take it so that it will behave as self-respecting samples do. In other words, so that it will behave as to the mathematical theory of samples. In other words, so it will give you a good estimate of what you are trying to estimate.

The Court: Yes. Now, what did you do back in this county of 30,000 or 40,000 in your mathematical sampling [291] technique?

The Witness: I had an airplane map made of the entire county. I divided every road into very small segments. I numbered the segments.

Then using what is called a table of random numbers, I picked 400 of those samples, those sample road segments, and told Mr. Roper to have his interviewers interview everybody who lived on those segments on both sides.

The Court: Yes?

The Witness: That is what I did.

The Court: That was all you did?

The Witness: That was all I did.

The Court: Then he had them interviewed?

The Witness: Yes.

The Court: And what happened?

(Testimony of William S. Robinson.)

The Witness: They forecast the election within the experimental error in that county.

The Court: In that county?

The Witness: Yes.

The Court: What was the name of that county again?

The Witness: Erie County.

The Court: How did his forecast come out?

The Witness: Very well.

The Court: What percentage was he off?

The Witness: That, if I may say, is irrelevant.

The [292] question is, was he off——

The Court: I am glad to know that.

The Witness: It is irrelevant from a statistical standpoint. The question was, was he off more than his predicted error, and he was not.

The Court: How much was he off?

The Witness: I don't know.

The Court: You don't know?

The Witness: No.

The Court: Whether it is irrelevant or relevant.

The Witness: No.

The Court: You don't know how much he was off?

The Witness: No, but I know that he was within the margin of error that I specified. He would be.

The Court: What margin of error did you specify?

The Witness: I don't know. I can look it up.

The Court: You don't remember that?

The Witness: No.

The Court: I see. Go ahead.

(Testimony of William S. Robinson.)

Q. (By Mr. Margolis): In this process of selecting numbered areas after preparing this map, is that just something that is done at random, or is there a definite, scientific way of doing it?

A. The word "random" has a particular meaning to anybody who takes samples professionally. It doesn't mean picking with no conscious bias; it means picking mechanically either by throwing dice, expensive dice, or preferably by using what is called the table of random sampling numbers.

The Court: Aren't all dice expensive?

The Witness: They aren't necessarily to the purchaser.

The Court: You made reference to this airplane map. Why did you take an airplane back there to pick out these segments? Was it to get the density of houses, is that it?

The Witness: No. Do you mind if I take the time to go into it in detail?

The Court: That is the idea.

The Witness: A sample is a group of cases or observations taken from a much larger group of observations about which it is desired to know something. That larger group of observations is called the population or a universe. The idea is, you take some cases to sample and they will tell you something about all the cases, the population. Mr. Roper takes 5,000 interviewers from people who are of voting age and have the proper qualifications for voting. He thereupon says the voting population of the United States, some 40 million, will vote 52 per cent Roosevelt, as my sample did.

(Testimony of William S. Robinson.)

Now, when you select a sample it has to be selected so that you can make forecasts of that sort reliable. It isn't necessarily true—it is almost in fact never true—that if you take a sample and compute, let's say, the percentage of [294] Democrats in it, the percentage of Democrats in the population from which the sample was taken is the same.

In other words, if you were to take many samples from a population, those samples of Republicans or Democrats would vary from sample to sample. Now, that variation, providing you take your sample in a particular assigned way, can be estimated when you take the sample by the theory of probability. I can give you another example of that.

If you toss a penny 50 times in the air, if you toss it so that it turns over and over so I am assured you cannot predict which way it will fall, or control it, and if furthermore you catch it in your hand and not let it roll on the floor, I will give you limits within the percentage of heads will lie in 50 throws or any other number of throws. And if you care to try me, I will do it.

But that is only because you have tossed the penny well over and over again. That assures randomness in your result. Were you able to control it, whether you could get heads or tails, naturally my prediction would be wrong.

The Court: That is the same person tossing the same penny?

The Witness: Any penny.

The Court: Or 50 people tossing the same penny?

(Testimony of William S. Robinson.)

The Witness: It would work just as well, but only because they toss it well, that is, what I am trying to get at, [295] because it goes over and over and over. It gives you what is called random results.

Likewise, there are ways of picking, let's say, 50 people from a large population which will give you very biased results.

The Court: Of course, there is a certain amount of force with which that penny must be tossed, and if you watch the number of times you can tell how many times it turns over, and so forth?

The Witness: Providing you throw it high enough so that you cannot do that or control it. If you would care to try it, I will do so.

The Court: Different people will toss it at different rate of speed also.

The Witness: That is true, but as long as they do not control it, as long as they flip it well. It has been experimentally observed as a fact, and there have been hundreds and thousands of coin throws to show that it can be done.

The Court: But in the penny-pitching example, there isn't the human element involved? You eliminate that there, don't you?

The Witness: Yes.

The Court: As much as you can?

The Witness: Yes, that is right.

The Court: All right. [296]

The Witness: Now, in picking a sample from a population, the attempt is made to eliminate the

(Testimony of William S. Robinson.)

human element as well. It is experimentally observed for example, that no one can pick out of a group and not pick with a bias. I can cite you at least a hundred references, not out of my head but out of my files, for that. Scientists who measure pointer readings and record simply the numbers which are recorded on a dial consistently get numbers which are biased. That is, if you take the minimum temperature readings for a given operator who reads temperature every night, you will find that he has ten times as many zeros and fives and sevens maybe as all the rest of the numbers together. There is no such bias in his observations. You get biases even in reading scales. No one can pick numbers on a page, from page after page after page, without some kind of bias as to position on the page. That has been demonstrated very adequately.

No one can even pick digits, let's say the numbers zero to nine, out of his head at the click of a metronome, and so forth, without a bias.

The Court: When you are saying "bias," you mean a habit of thought?

The Witness: A habit of thought which causes you to select one kind rather than another. Consequently, it is never safe in taking a sample to take it by picking its members, even if you try to do it at random. It must be done, if [297] you are to believe in your results and if your results are to be verified, by taking the members of your sample from your population by a purely mechanical pro-

(Testimony of William S. Robinson.)

cess in which no judgment whatever is involved. You can do it by flipping a coin, if you are careful to flip it well; you can do it by throwing dice, if you are careful that the dice are good dice and you don't throw them on a mohair surface, because the holes in them will give certain bias in your result. Best of all, the accepted procedure is to use the table of random numbers. It is a table of digits from zero to nine some 10,000 or 100,000 of them, which have been checked in various ways, but they have been shown to be random already.

The Court: Now, is that how you happened to pick these sections by airplane?

The Witness: That is why I numbered the segments.

The Court: Why did you pick them?

The Witness: I wanted them random. If you don't pick in a way that corresponds to chance——

The Court: You had an airplane map made of the whole county and then divided that up into squares?

The Witness: It was simply devised to get at the roads.

The Court: You divided that up into squares and then numbered the squares?

The Witness: No, I didn't divide them into squares, because that presented administrative difficulties. I traced [298] all the roads over with a pencil and divided them into short strips.

The Court: You divided the roads into short strips?

The Witness: Yes.

(Testimony of William S. Robinson.)

The Court: And then numbered those?

The Witness: Then numbered those segments.

The Court: Consecutively?

The Witness: Yes, beginning arbitrarily at some point.

The Court: Beginning at random?

The Witness: Oh, no, I didn't, and I don't need to.

The Court: Why did you begin where you did begin?

The Witness: Because it was convenient to.

The Court: Because it was convenient?

The Witness: Yes.

The Court: Only?

The Witness: I began in the lower left-hand corner.

The Court: Then you numbered all of those consecutively?

The Witness: 4,096, as I remember it.

The Court: Then you applied to that what you call your random number, is that what you mean?

The Witness: Table of random numbers, or random sampling numbers.

The Court: Table of random numbers or random sampling numbers?

The Witness: That is right. [299]

The Court: And then you picked which ones?

The Witness: If you insist upon knowing, I took blocks of four digits from that table. The tables are arranged in rows and columns. I took the first four columns of digits. The digits come in random order, as I say.

(Testimony of William S. Robinson.)

Let's suppose that the first four digits in that table were 6792. All right. I just threw that out because it didn't match my zero in the 4096 from my road segments. Whenever I four four digits which corresponded to my number 4096 I took that road segment, with that number as one member of my segment of road samples.

The Court: The reason you took a road is because people live near the road?

The Witness: Exactly. It was just a way of dividing my population into very small groups of people which could be numbered and identified in the field as belonging to groups of different numbers.

The Court: All right.

The Witness: I selected a number of those groups of people at random, strictly mechanically, and those people constituted the sample.

The Court: How many? You said he sampled 5,000 people.

The Witness: No.

The Court: How many squares did you have?

The Witness: I had segments. [300]

The Court: How many segments did you have in that county?

The Witness: As I remember, there were 4,096.

The Court: And you sampled 5,000 people?

The Witness: Not 5,000. That was in reference to the sample Mr. Roper takes on a nation-wide basis to forecast an election.

The Court: How many of these segments did you have him sample?

(Testimony of William S. Robinson.)

The Witness: I picked the number which would give me, from rough estimates, the proportion of people in the country that we wanted, or the total number of cases that we wanted in our sample, which happened to be 3,000.

The Court: 3,000?

The Witness: I think it involved 200 road segments, but I am not certain.

The Court: About 200 road segments, and you estimated 3,000 people?

The Witness: That is right.

The Court: In that county of 30,000 to 40,000 people?

The Witness: That is right.

The Court: Or about 10 per cent of the population?

The Witness: That is right.

Q. (By Mr. Margolis): You did a similar consulting job for Life Magazine, did you not? [301]

A. This was in connection with the Life study of the 1940 election.

Q. Was that a similar type of job?

A. It was the same one. Life, let's say, financed the study, at least financed it in part, and the Rockefeller Foundation financed it in part. Mr. Roper was hired to do the field work and the Office of Radio Research was hired to do the planning work and the analysis work.

Q. Have you done any writing on the subject of statistics?

(Testimony of William S. Robinson.)

A. Yes. I have a contract for a book on statistics with Houghton, Mifflin & Company, of which I have written some 900 pages.

The Court: Introduction?

The Witness: Well, there are 2500 pages called for all together.

I have also written a number of articles, but, in the main, what I write in the technical field of statistics are in various governmental agency files because most of my writing was done during the war and on specific jobs. [302]

Mr. Janney, will you come forward, please?

VERNON W. JANNEY

called as a witness by the Court, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, sir.

The Witness: Vernon W. Janney, J-a-n-n-e-y.

The Clerk: Take the stand, please.

Direct Examination

By the Court:

Q. You are the Assistant Secretary and Assistant Jury [308] Commissioner of Los Angeles County, Superior Court?

A. Yes, sir.

Q. You came over this morning in response to my telephonic request? A. Yes, sir.

Q. Concerning the method of selecting juries for the Superior Court of Los Angeles County?

A. Yes, sir.

(Testimony of Vernon W. Janney.)

Q. This is the nisi prius court and court of general jurisdiction in the State of California for matters over \$2,000 and other matters?

A. Yes, sir.

Q. Will you state, if you can, as briefly as you can, your method of selecting jurors?

A. We try to draw our jurors from the entire County of Los Angeles.

Q. Let me suggest this. You state how you have selected the current jury and then we can determine whether that is a pattern.

A. All right.

This jury list we filed on February 1st was selected in this manner. We receive from the registrar of voters the entire voters' registration in the precinct sheets. We took each fifth precinct, in other words, we took 1, 6, 11, 16, and so forth. [309]

Then the precinct sheets that we selected, we took each ninth name, we checked each ninth name, and from the names that were checked we then mailed a letter directing them to report to the Secretary's office for examination.

Q. Do you have a form of that letter?

A. Yes, sir.

Q. You also have one precinct sheet there, have you?

A. Yes, sir.

Q. With the names checked on it?

A. Yes, sir.

Q. Very well.

We will just mark those here in evidence.

The Clerk: As government's exhibits?

Mr. Calverley: That is agreeable.

(Testimony of Vernon W. Janney.)

The Court: This will be Exhibit 5-A, form of letter will be 5-B.

(The documents referred to were received in evidence and marked Government's Exhibits Nos. 5-A and 5-B, respectively.)

Q. (By the Court): How many names did that method secure for your current juries to whom you mailed the letters?

A. We mailed out 33,000 letters. Of the 33,000 letters, 2,760 of them were returned as undeliverable.

We had 12,274 letters of correspondence, either asking to be excused or deferred. [310]

Q. Those who asked to be excused, they were among the exempt classes?

A. Yes. They were doctors and lawyers and persons in poor health or at an age that would disqualify them, or women with children and no one to take care of the children.

Q. In other words, they fell in the class which, by California law, are exempt from jury service?

A. Yes, sir.

Q. Now, in sending the names out in your current list to the voters registered, the voters' list does not indicate the occupation?

A. No, sir; not now.

Q. So you cannot determine from the voters' list whether that person would or would not be exempt?

A. That is right.

Q. Previously the list did contain the occupation?

A. Yes, sir.

(Testimony of Vernon W. Janney.)

Q. And when you sent out the cards, then you skipped——

A. If a name was checked and it was someone that was exempt, we took the following name.

Q. Very well. Proceed.

A. There were 9,871 who were excused at the desk, the first desk as they come in where they present their letter, and if they wish to be excused they state their reason. If the reason is obviously valid, the secretary there excuses [311] them on an affidavit form.

Q. That is to say, if a person is obviously blind, for instance?

A. Yes, or if they cannot read nor write, or if they have a doctor's certificate, or something of that nature, we excuse them on this affidavit form.

The Court: This affidavit form will be Exhibit 5-C.

(The document referred to was received in evidence and marked Government's Exhibit 5-C.)

Q. (By the Court): Proceed.

A. Then those that are not excused are given a questionnaire to fill out. This questionnaire gives us a pretty good picture of the person from the health standpoint, whether they have served in a court of record in the previous two years, whether they had been convicted of malfeasance in office or any felony or other high crime.

We ask them if they will support the constitution,

(Testimony of Vernon W. Janney.)

what their occupation is, by whom they are employed, and general information of that nature.

Q. Do you have that blank form there?

A. Yes, sir.

Now, the other part of the questionnaire tells us whether or not they have a working knowledge of the English language. The other two parts of the questionnaire give us an idea of their ability to think. [312]

Then this questionnaire is returned to another desk where it is graded and it comes to the Jury Commissioner or the Assistant Jury Commissioner.

Q. Now, those tests there that are calculated to determine whether or not they have a working knowledge of the English language and of their ability to think, were they devised by some educational institution or some professor of sociology?

A. Yes. This was set up in 1936 by qualified men. I cannot at the moment tell you who they were, because I wasn't there and I don't know, but they were selected by the court.

Q. Were they judges, lawyers or teachers?

A. Professors and psychologists, and I think one was a businessman. It was all done under the guidance of a committee of the Superior Court judges.

Q. Very well. Now, you have that blank form there?

A. Yes, sir.

The Court: This will be the next in order, 5-D.

(The document referred to was received in evidence and marked Government's Exhibit No. 5-D.)

(Testimony of Vernon W. Janney.)

The Witness: Now, from the questionnaires presented the Jury Commissioner or the Assistant Jury Commissioner, there was a total of 2,863 excused, and there were 3,705 approved. [313]

Q. (By the Court): For service out of the 33,000?

A. Yes, sir.

Now, then, if there is a number of names that have not been drawn from the previous list—and in this case there were 966—we correspond with them and ask them if they could serve at this next term, and of the 966 we had 322 that replied they could and would.

Q. And who had been previously qualified?

A. Yes, sir.

Q. Have you made some calculations of the cost to the county?

A. There is the letter that we send out asking those people. That is one that has been used. We did not have an unused one.

The Court: Very well. This will be Exhibit 5-E.

(The document referred to was received in evidence and marked Government's Exhibit No. 5-E.)

The Witness: We have estimated what the cost is of our jury operations. This is only an estimate, because our office has two functions, one being that of the Jury Commissioner and one being that of the Secretary of the Courts. The functions overlap and therefore it is almost impossible to get an exact break-down of our costs, but I think these are fairly accurate.

(Testimony of Vernon W. Janney.)

Q. (By the Court): Let us break it down into some unit. [314] You have broken it down into the cost per qualified juror, have you not?

A. Yes.

Q. What is your estimate of that?

A. The cost per qualified juror would be \$2.30 per qualified juror. It cost us \$9,172.50 to obtain 4,000 names.

Q. That is the system you have followed for some years?

A. Yes; we have been following this system since 1936.

Q. And the number of names qualified each time approximates the same, about 10 per cent?

A. Yes. Roughly, we estimate about 10 per cent of the letters we mail out we will receive in qualified jurors.

The Court: Very well. Any questions on the part of either counsel?

Mr. Kenny: I have just one question, your Honor, and this goes to—I take it this is an administrative feature?

The Court: As long as we are making a record, we might as well make it.

Mr. Kenny: Yes.

Cross-Examination

By Mr. Kenny:

Q. Would the attitude of your department be favorable to legislation—it would have to be joint state and federal legislation—which would permit your department to furnish [315] at cost to the fed-

(Testimony of Vernon W. Janney.)

eral jury system, jurors obtained in this way? In other words, what I am suggesting——

The Court: I think that is material, in view of the comments in the Thiel case, that the court should always be alert to find a better way.

Mr. Kenny: That is right.

The Witness: Well, I couldn't answer that, because the policy of our office is dictated by the judges of the Superior Court.

Q. (By Mr. Kenny): It would, Mr. Janney, serve, though, to cut down your general overhead without any increase of operation, if such legislation were passed so that the duplication and selection between federal and state juries was removed and you more or less wholesaled out the jury selection?

A. Yes, it could be done, but not under the present conditions, because of working space. We are under-staffed now, and it would be impossible.

The Court: I think what Judge Kenny is referring to is this, if in this court there were the current term we are presently using—what, about 839 names?

Mr. Hocke: We haven't used that many yet, your Honor.

The Court: You have that many in the master box that you have drawn?

Mr. Hocke: That is right.

The Court: And you figure they may be drawn during this [316] next term of court?

Mr. Hocke: I think they have all been drawn out but not all returned yet.

(Testimony of Vernon W. Janney.)

The Court: Assume that there should be 800 during the term of court, the idea is whether or not it would be feasible, instead of the Federal Court securing a list of jurors, that the clerk if this court would simply call on you to draw out 800 names and send the list over here and have him subpoena them in.

The Witness: That would cut the cost down for both, both court systems.

Mr. Kenny: When the Legislature is in session and Congress also is in session, it might be an occasion just from an administrative process.

The Court: I don't know. Maybe it can be done by rule of court.

Mr. Kenny: It might. That is all I have. No further questions.

Cross-Examination

By Mr. Calverley:

Q. Mr. Janney, you are provided with a clerical staff by the State, is that true?

A. Yes, that is true.

Q. What is the extent of the clerical staff provided you for this service by the State? [317]

A. The number of employees?

Q. Yes.

A. Directly in this jury activity, there are eight secretaries and——

The Court: Engaged full time?

The Witness: No, they are not engaged full time. There is only one person, we might say, that is engaged full time. That is one secretary.

(Testimony of Vernon W. Janney.)

The Assistant Jury Commissioner is only engaged half time, we estimate. We have eight other secretaries that we estimate are engaged half time. And I have two messengers that are engaged half time.

Q. (By Mr. Calverley): Do you pursue any other occupation other than that of Jury Commissioner?

A. No, I am Assistant Secretary of the Courts.

The Court: You are on a full-time salary? Your job is a full-time job and a salaried job paid by the State?

The Witness: That is right.

The Court: The purpose of that question is to point out for the record that the Jury Commissioner in the Federal Court has drawn about \$15 a year for his services.

Q. (By Mr. Calverley): Mr. Janney, I don't recall if you answered this question, but will you state, if you can, what proportion of the prospective jurors to whom you send out the original letters that you testified to, what proportion [318] of those to whom you send out those letters reply to them?

The Court: He testified that there were 33,000, or twenty some-odd thousand that they didn't get.

The Witness: There were only 1,527 that we hadn't accounted for by the time we filed the list, but a good part of those will straggle in over the next several months, either returned by the post office, some of them coming back from the Philippines, some coming back from Japan, some coming back from Germany, where they have been forwarded to

(Testimony of Vernon W. Janney.)

the boys in service, and some have since died. But ultimately we account for all but about 1 per cent.

The Court: Let me see. The figure that you first gave was a figure of some 2,000 who were returned deceased.

The Witness: Yes, returned as undeliverable. That is 2,760.

The Court: Then, in addition to that, there were about 1,500?

The Witness: Yes, sir.

The Court: So there is about 10 per cent of the list that either do not answer, you do not hear from them, or something like that?

The Witness: Yes.

Now, that figure will vary depending on the age of the precinct sheets that we have. When we first receive them we will have a mail return of 3 per cent or 4 per cent. By the [319] time the sheets are two or three years old we will have a mail return of 10 per cent.

Q. (By Mr. Calverley): In selecting these names from the registrar of voters' lists by precincts, I believe you testified you took each ninth name in this last impanelment? A. Yes.

Q. Do you pay any attention, or does your office pay any attention, to the occupations of the persons selected?

A. At the present time we have no way of determining what their occupation is because it isn't shown on the precinct sheets.

Mr. Calverley: That is all, your Honor.

(Testimony of Vernon W. Janney.)

The Court: Any questions, Mr. Garrett?

Mr. Garrett: Yes, your Honor.

Cross-Examination

By Mr. Garrett:

Q. Mr. Janney, I understood you to say that for the names filed in February, 1947, for the selection of those names you used precinct sheets from the registrar of voters from the county, is that right?

A. That is right.

Q. Those precinct sheets were all old sheets at that time, were they not?

A. These sheets this year were issued by the registrar of voters, I believe, last April. [320]

Q. Does he issue new sheets after the holding of a general election when the dropping of non-voting registrants occurs?

A. No, those sheets are issued prior to the general election. They have been in the past issued every two years.

The Court: And you get them every two years?

The Witness: Yes, sir.

The Court: You get a new sheet every time there is a new issued?

The Witness: Yes, sir.

Q. (By Mr. Garrett): And on general election years, the sheets are usually issued in the April prior to the general election, is that right?

A. That is right.

Q. The sheets on all precincts are not issued at the same time, are they?

A. For the entire county, yes.

(Testimony of Vernon W. Janney.)

The Court: When you say county, you mean all of the cities within the county? You do not just mean the county territory like the sheriff does when he is talking about the county?

The Witness: Well, it is every registered voter within the county.

The Court: Within the county?

The Witness: Yes, sir. [321]

The Court: Because some of the—well, all of the municipalities have separate voting sheets and separate numbers?

The Witness: Yes, sir.

The Court: Like it is Maywood 1, 2, 3, etc.?

The Witness: That is right.

The Court: Now, by the way, are your juries for the Long Beach, Pomona, Glendale and Santa Monica areas, do they come from the same list?

The Witness: Yes, they come from the same list, but we go into each of the judicial districts and qualify the jury from that district.

The Court: You mean you send out separate—

The Witness: We send out a crew to Pomona, we send out also a crew to other sections, and when we send a crew to Pomona we operate from the Pomona Superior Court for two days.

The Court: For registered voters in that area?

The Witness: For registered voters in the Pomona judicial district.

The Court: But in Los Angeles, the courts sitting in the city of Los Angeles, you likewise include those and take the whole county?

(Testimony of Vernon W. Janney.)

The Witness: We take the whole county, except we don't as a rule, go into Long Beach because we have four courts in Long Beach, and in drawing a jury for Long Beach we draw a [322] jury of about a thousand names, so that about blankets the Long Beach judicial district.

But we do draw for the—we do take people from Long Beach and we do have Long Beach people on the list, but we don't go into Long Beach to draw them. They are people that have moved from Los Angeles to Long Beach and are willing to serve in Los Angeles. Most people would prefer to serve that are living in the Long Beach judicial district in Long Beach because of the transportation.

Q. (By Mr. Garrett): There are people that are on your general mailing but when they come in you find that they are either living in the Long Beach area or have moved there and would prefer to serve there, is that correct?

A. Yes. And if they are within the judicial district, we put them on that list at their request.

Q. Now, you sent out 33,000 letters for this February list, as I understand it.

A. Yes, sir.

Q. And those 33,000 letters were taken from the registrar's lists after they had been arranged in numerical order and every fifth list taken out, is that correct?

A. Yes. We take each fifth precinct. They, for instance, we are just starting, we will take 1, 6, 11, 16. After we have gone through the entire count,

(Testimony of Vernon W. Janney.)

then we will take 2, 7, 12, 17. Then the next time we go around we will take 3 [323] 8, 13, and so forth, so theoretically we blanket the entire county.

Q. In succeeding years? A. Yes.

The Court: On each call?

The Witness: On each call we blanket the county. Ultimately every person in the county, if the voters' registration list were static and didn't change, ultimately every person in the county would be called by our office, but the list changes so there may be some people that might not be called because their names have been skipped or because the list has changed.

Q. (By Mr. Garrett): But what I am trying to get at is a situation in respect to the February, 1947 names, on which you sent out the 33,000 letters. A. Yes, sir.

Q. Now, they were sent out after an election which was made from a complete set of precincts lists for the county furnished by the registrar, were they not?

A. Yes, sir; that is right.

Q. And that selection resulted in your taking out every fifth list for the selection of names therefrom, is that correct? A. That is right.

Q. Now, as I understand it, only the precinct list is [324] selected for that operation of selecting every fifth one which had names drawn from them for this February, 1947 list, is that correct?

A. That is right.

Q. And after taking out from the complete lot

(Testimony of Vernon W. Janney.)

of lists of the registrar arranged in numerical sequence, every fifth one of those lists, you then proceeded to select a certain name on each of those lists so selected, is that right? A. Each ninth name.

Q. And that was the ninth name?

A. That is right.

Q. That wouldn't produce 33,000 names, would it?

A. Yes. The average sheet is about 350, so you take each ninth name and you have one-ninth of 350 off of each sheet.

The Court: How many precincts in the county?

The Witness: There are about 3,300, I believe.

The Court: In the county?

The Witness: Yes, sir.

The Court: I thought there were 4,000 in the city, or something like that.

The Witness: No, no. Judge, you are right. I think there is 3,300 in the city alone.

The Court: In the county all together how many are there?

The Witness: I don't know how many. [325]

Q. (By Mr. Garrett): There are about 5,000-precincts in the county? A. I don't recall.

Q. Let's assume there are. A. Yes.

Q. So I can get to the point of my question.

A. All right.

Q. How could you get 33,000 names by selecting one name from each of 5,000 lists?

The Court: He doesn't. He picks every ninth name.

(Testimony of Vernon W. Janney.)

The Witness: Each ninth name.

The Court: Look at your exhibit. He has them all checked here.

Q. (By Mr. Garrett): It is not only name No. 9. but it will be No. 18 after that and 27 after that, is that correct? A. Yes, that is right.

Q. Now, you spoke of receiving 12,274 letters of correspondence as the result of this mailing, is that the correct figure? A. Yes, sir.

Q. Were those letters written in reply to your letters by the addressees of your letters?

A. Yes.

Q. And there were besides the 2,760 returned as undeliverable about 1,500 that had not been accounted for, is that [326] correct?

A. That hadn't been accounted for on February 1st; yes.

Q. May I call this to your attention, 2,760 returned as undeliverable and 1,500 unaccounted for, and 12,274 reply letters, that adds up to about 16,000 as against your 33,000 letters that were sent out. So there were approximately 16,000 of those letters that you sent out that you never heard from again, I assume?

A. No. There were 12,000 of them that corresponded with us and we answered them and either told them to come in or excused them.

Q. What did you do about those addresses among those of the 33,000 letters whose letters were not returned as undeliverable and whom you have not listed as unaccounted for and who are not in-

(Testimony of Vernon W. Janney.)

cluded in the 12,274 who replied? That looks as you didn't get replies from about 16,000 of your addressees, is that correct?

A. No, we did get replies from 12,274 and the postman delivered back to us 2,760 that couldn't be delivered because the people had moved from the city or they were not known at that address

Q. And you say you have 1,500 that you can't account for.

A. 1,527 unaccounted for as of February 1st. A year from now, if they haven't been accounted for we will send them [327] a registered letter?

The Court: Mr. Witness, you have that tabulated out there, haven't you?

The Witness: Yes.

The Court: Maybe is counsel would just look at this sheet—is this an extra copy, this one sheet?

The Witness: Yes, sir, that is an extra copy. The only sheet I haven't an extra copy of is the cost sheet.

The Court: Do you wish to look at this? This breaks it down.

Mr. Garrett: Thank you.

The Court: He has indicated stragglers there, and that, as I understand his testimony, is the 1500, or the portion of the 33,000 that are not accounted for, either not returned undeliverable, haven't answered by correspondence, or haven't personally appeared.

Mr. Garrett: Yes. The difference came into the office without reply.

(Testimony of Vernon W. Janney.)

The Court: Yes. In other words, about 16,000 of them showed up.

Mr. Garrett: I understand now.

The Court: This you can mark next in order, 5-F.

(The document referred to was received in evidence and marked Government's Exhibit No. 5-F.)

Q. (By Mr. Garrett): Did that figure of those that you [328] sent letters to asking whether they could serve, will you give me that figure again? I have it here as 966, but I am not sure.

A. 966 names were not drawn from the wheel in the previous year. Those people we corresponded with asking them if they could serve, and we received, I believe, 322 replies who answered yes, they would serve.

The Court: Are jurors in the Superior Court excused after 20 days of actual service?

The Witness: 20 days of actual service, or if they are in business and request it, a judge will excuse them after they have been on the list for 30 days.

The Court: That is, they have a period for 30 days?

The Witness: For one month they have answered the calls for a month's period.

The Court: But not called?

The Witness: But may not have served their full 20 days.

(Testimony of Vernon W. Janney.)

The Court: When you get these 10 per cent of the names who are qualified, you from time to time send out letters for them to report?

The Witness: When we compile a list it is turned over to the County Clerk and the County Clerk, the judge and the sheriff send out the names that are drawn, and they are directed to report on a specific date by registered mail.

The Court: And they stay there until they have served [329] 20 days in the trial of a case?

The Witness: Yes, sir.

The Court: Or until at the end of 30 days whether they have served at all or less than 20 days?

The Witness: That is right.

The Court: Upon request of a judge they may be excused?

The Witness: That is right.

Mr. Garrett: I just have one other question.

Q. In sending out the letters from the selected precinct sheets, do you, under your system, indicate by a checkmark or otherwise on the precinct sheet the fact that the original letter to the voting registrant has been sent out?

A. Yes, each precinct sheet.

The Court: Like this one that you put in evidence here?

The Witness: Yes, sir.

The Court: Which has a checkmark after each name?

The Witness: Yes.

(Testimony of Vernon W. Janney.)

Q. (By Mr. Garrett): Are those precinct sheets retained until new precinct sheets are issued?

A. That is right. This one here is one that we just used.

Mr. Garrett: Thank you. That is all.

The Court: One other question: From this pool of jurors you call both the civil and criminal jurors of Los Angeles County? [330]

The Witness: Yes, sir.

The Court: For the trials held in the city of Los Angeles?

The Witness: Yes, sir.

The Court: Mr. Margolis, do you have any questions?

Mr. Margolis: No questions.

The Court: Any other questions?

Mr. Calverley: No questions.

The Court: Thank you very much, Mr. Janney.

(Witness excused.)

WILLIAM S. ROBINSON

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

The Court: Mr. Robinson, you were sworn yesterday.

The Witness: Yes.

The Court: In connection with your motion to dismiss, I understand from the questions that were asked the Jury Commissioner yesterday and the avowals that were made by Mr. Garrett, that some

(Testimony of William S. Robinson.)

point will be made of the fact that the persons selected from the Southwest Blue Book lack that degree of impartiality required by the Constitution to be a juror.

Mr. Margolis: That is not our point at all, your Honor. The point is that by selecting—— [331]

The Court: That because they do not have any longshoremen on it, they are disqualified to try this case?

Mr. Margolis: That is not a way of getting a cross-section of the community.

The Court: But reducing it down to what you are actually getting at, it is that there are no longshoremen in that book, or no persons who work by the day, or no people who labor, and therefore they are disqualified.

Mr. Margolis: No.

Mr. Garrett: If your Honor please, since your Honor has referred to me, I should perhaps answer your Honor's inquiry.

The Court: Let me continue my statement first.

The Constitution requires that people tried by jury should be tried by an impartial jury. It is just as essential that you be tried by an impartial judge. My attention was called to the fact yesterday that my name is listed in the Southwest Blue Book. If therefore you intend or expect to make a point that the persons whose names are in that Blue Book are not impartial, I think perhaps that you had better institute proceedings to ascertain whether or not I am qualified or disqualified to continue in this case.

(Testimony of William S. Robinson.)

Mr. Margolis: That is not our point at all, your Honor. I don't think that it would be possible for us to have a judge who constitutes a cross-section of the community. [332]

The Court: Or half male and half female.

Mr. Margolis: That is right.

The Court: Well, the Ballard case indicated that that was a requisite for a jury.

Mr. Margolis: That indicates that there is a different test for the composition of a jury and for the method of selecting a jury than there is for the composition, if we can call it that, of a judge or the method of selecting a judge.

The Court: The Jury Commissioner is a public official. The questions directed to him yesterday indicated that some point would be made of a possible bias on his part, as well as the answers from the witness now on the stand that it was impossible for any person to proceed to a disposition of anything without having his actions affected by bias and prejudice.

Now, in view of the fact that those questions were directed to a public official—and I am a public official—I want to know now if some point is to be made, because if it is, it had better be tried now before we go on with this case and incur the expense which is bound to follow, or if a groundwork is being laid for disqualification of the judge in connection with the listing of my name, which I knew nothing about, I will say, in this so-called Blue Book.

(Testimony of William S. Robinson.)

Mr. Margolis: Your Honor, we of course make no such contention. We do not contend that the people in the Blue Book [333] are disqualified as jurors.

The Court: Or lack impartiality?

Mr. Margolis: They, as every other person, lack complete impartiality.

The Court: I do not think that the Constitution goes that far.

Mr. Margolis: I don't know of any person who is impartial in the sense of the word that he doesn't have views and convictions.

The Court: In the sense of the word that it was used in the Constitution, I do not think the people who wrote the Constitution approached it with the same attitude of mind that Dr. Robinson is approaching the question of impartiality. It was used as a common-sense term.

Mr. Margolis: That is right, but I think it is necessary——

The Court: And as to what reasonable men consider impartial.

Mr. Margolis: But it is necessary to distinguish between an impartial juror and an impartial jury. A jury made up of impartial jurors, all of whom are millionaires and each one of whom is impartial and selected exclusively from a list of millionaires, might very well, and would, violate the Constitutional rights of the parties involved in that case, even though each individual millionaire was an impartial juror, and might, as an individual in a jury

(Testimony of William S. Robinson.)

which represented a [334] cross-section of the community, perfectly well qualified as an impartial juror. But in order to obtain an impartial jury, it is necessary to have a cross-section of the community represented, or at least it is necessary to have the jury selected in such a manner that the result ordinarily will be a cross-section of the community.

The Court: The distinction seems to me to be this, the Constitution says that a man is entitled to an impartial jury, and by virtue of the recent decisions of the Supreme Court, they seem to say that a man is entitled to be tried by an impartial jury which is impartially selected.

Mr. Margolis: That is right. But by impartially selected, the courts are not talking in terms of motive; they are talking in terms of methods used to select the jury, as I intend to point out to your Honor when he argue the cases.

For example, a method, a wrong method, can be used with the best of motives.

The Court: And get a complete impartial jury.

Mr. Margolis: And get a jury which is not impartial, and that is to be condemned.

For example, a person, let us take a stranger in town, a jury commissioner who came into town and thought that the Los Angeles Country Club represented a cross-section of the community—that was the information that he had—and believing that that was a good way of getting a cross-section [335] of the community, and expressly disavowing any

(Testimony of William S. Robinson.)

intent to discriminate, no desire to discriminate, but because he actually and in good faith believed that the Los Angeles Country Club represented a cross-section of the jury, used a list of members of the Los Angeles Country Club. His motive wouldn't make any difference because the method was a biased method in the technical, scientific sense, bound to lead to a biased result. I think that when the cases speak of—

The Court: That is to say, the people selected there would not be an impartial jury.

Mr. Margolis: That is right, they would not constitute an impartial jury.

The Court: By the same token, then, your challenge of the people who were listed in the Blue Book are not capable of making an impartial jury?

Mr. Margolis: Not if you make up a jury of 12 from the Blue Book.

The Court: And having one judge whose name happens to be in the Blue Book, do you then have an impartial judge?

Mr. Margolis: I said, your Honor, we make no point on that.

The Court: I am not asking you to answer that; I am asking you the question as to whether or not there is any question in your mind. If there is, there is a procedure by which [336] you can determine my impartiality to try this case.

Mr. Margolis: Your Honor, we are aware of that procedure and if there had been any question in our mind the procedure would have been

(Testimony of William S. Robinson.)

begun before this, your Honor. We would not hesitate to use it if we believed this was the proper place to use it, but because we do not believe it, we are not using it.

The Court: Very well.

Mr. Garrett?

Mr. Garrett: I would like to say this, your Honor, and I would like to refer again—I would like again to have your Honor recall the references that I made to the case of *Smith v. Texas*—Mr. Brown was a witness on the stand yesterday and he was called as a witness on just one point, that is, his testimony had just one avenue of relevancy in this motion, and that was that it was relevant, in so far as it bore upon the manner or method of selection of a jury in which he had a part, a jury list from which petit and grand jurors were selected. That was the purpose of our inquiry.

In the course of his testimony it developed, and it developed as far as I was concerned for the first time, that various lists were used by him in his selection of prospective jurors. I want to make it plain that his functions are clearly not that of a judge. I have never associated his capacities of his duties with those of a judge in any sense of the word. [337] A judge has certain functions, and this witness on the stand has certain very narrow and certain very little defined functions relating solely and exclusively to the machinery of the selection of names from which trial juries and grand juries are drawn.

(Testimony of William S. Robinson.)

Now, when the testimony of this witness revealed that various lists were being used, whether they were phone books or whether they were lists of memberships in clubs, inquiry into the use or the reasons for the use of those lists seemed to me was material as tending to bear upon the question of how the method of selection committed to that witness on the stand, that official, as your Honor uses the word, how that official was pursuing his duties and by what method. And I want to make it very, very clear again——

The Court: I permitted all of your questions because I deemed them material.

Mr. Garrett: That is right.

The Court: Whereupon the questions to which I sustained objections, wherein you made your avowals, that is the thing that provoked the thoughts that are in my mind now. I took it from your avowals that you considered him disqualified because he was listed in the Blue Book and had selected names from the Blue Book, and that he was not impartial.

Mr. Margolis: I wonder if I can comment on that?

Mr. Garrett: May I continue without being interrupted, please, for just a moment? [338]

Mr. Margolis: Excuse me.

Mr. Garrett: It developed that he was using these lists, your Honor——

The Court: I am not accusing anybody of anything.

(Testimony of William S. Robinson.)

Mr. Garrett: No, I understand, but I want to relate the questions which your Honor has commented on to their purpose, if I possibly can.

It was developed that he was using these lists, and the question of what judges or what attorneys might be in any of those lists was, to my mind, utterly immaterial in asking the questions. It happened to turn out that some of us were on some of those lists and some of us have belonged to some of the clubs, or do belong to some of the clubs, or our families from which those lists were taken, and in my mind at least that was a consideration utterly foreign to the questions that were asked of the witness.

The questions asked of the witness were merely for the purpose, not of showing that your Honor or I or Mr. Kenny are disqualified because we are members, or members of our family happen to be on certain of those lists that were used——

The Court: You and Judge Kenny are employed as technicians here. It was a matter of choice of the defendants. It is not a matter of choice of the defendants that I am here.

Mr. Garrett: Those questions, I may say, your Honor, were [339] asked for this purpose, to show merely whether the material used by the witness was narrower than it should have been, and it doesn't matter that the lists, which were largely, or even we might have a situation in which they were exclusively, used, it didn't matter as far as the materiality of the questions to that witness

(Testimony of William S. Robinson.)

was concerned, whether they were lists of country clubs, lists of social registers, lists of labor unions, or bartenders' clambake societies; it was merely an attempt to show, and it didn't matter in the least, whether we or any one of us were associated with those lists or not, it was merely an attempt to show, if I could, by implication to your Honor, that the witness, like everyone given the power of selection or given it, would tend to select from the media that were most familiar to him and to have your Honor draw the inference, if it were felt that that media for that reason or any other reason had been either exclusively used or too largely used, that what had resulted was not the result to which this witness' duties committed him, that is, to draw from a substantial cross-section. That was the purpose of that examination, your Honor.

The Court: May I have an answer to my question? Do you have an intention of avowing my lack of impartiality in the trial of this case by virtue of the fact that my name is in the Blue Book?

Mr. Garrett: I do not. [340]

The Court: Very well.

Mr. Garrett: And knowing me, I hardly see how that question need be raised, if your Honor please. But I merely have spoken as long as I did, not only to show you that my intention was not to raise any such question, but to show you, if I could, that the inference need not be drawn

(Testimony of William S. Robinson.)

that my intention was to raise any such question, because the questions had a useful purpose, if they tended to show reliance on any media, whether that media were one or the other, or whether that list were one or the other.

The Court: I wanted to get the record straight, and that was the reason I was asking the questions.

Mr. Kenny: Your Honor, just in defense of the people I am with, I can conceive of a circumstance where that kind of a jury would be all right. For example, if a jury would be selected for, say, the police court in San Marino, which we know is a community almost composed of blue bookers, that that would be perfectly proper.

The Court: I do not know how or why I got into the blue book. It said in the beginning that it came from old families. I am not an old family; I was a country boy who landed here some time ago.

Mr. Kenny: There is nothing wrong with being a blue booker, and in a community of blue bookers, such as San Marino, it would be perfectly proper to use the blue book. [341] But where you have a community where there are a few people who are not in the blue book, then you shouldn't. That is the point.

The Court: I do not know what the people do who are in the blue book. It says it is a society register of old families and eligible newcomers.

Mr. Margolis: Shall I proceed, your Honor?

The Court: Proceed.

(Testimony of William S. Robinson.)

Direct Examination

(Continued)

By Mr. Margolis:

Q. Dr. Robinson——

A. May I clear up one thing?

Q. Yes, surely.

A. I would like to clear up one misapprehension which I apparently got across yesterday, and that is in the matter of bias.

Statisticians use the word in a technical sense, in this way: If a person picks a sample and it is not like the population, that person is biased. There are no ethical connotations to it. I admit to be extremely biased in picking samples by eye, say, from lists. Everyone is. It is merely the fact that people unconsciously pick certain things.

Q. You mean when you picked people to wash those 60,000 slips?

A. Or any other way. So I am driven, as every other [342] practicing statistician has been driven, to the use of really a random method of picking, that is all. Everyone is biased. Einstein himself, in an article in *Science*, has admitted to extreme bias. When he reads a scale he gets almost exclusively the numbers 0, 4 and 7 for the last digits. He never gets 3's or he never gets 8's, and yet he is a perfectly good scientist. Perhaps that will at least clear up my statement.

Incidentally, I have brought you some random numbers, if you would like to see it.

(Testimony of William S. Robinson.)

Q. You have a random number table here?

A. Yes.

Mr. Margolis: I think it would be interesting to have one in evidence, your Honor.

The Court: Yes.

Mr. Margolis: To illustrate the witness' testimony.

The Court: Yes.

Q. (By Mr. Margolis): I have here a document marked "Random Numbers (III)." Will you explain what this is, Doctor?

A. There are several pages of such numbers. This is the first one.

Q. That is the random number system you referred to in your testimony yesterday?

A. That is a selection from one of the well-known tables of random numbers. [343]

Mr. Margolis: I will offer it in evidence as defendants' exhibit next in order.

The Clerk: V.

(The document referred to was received in evidence and marked Defendants' Exhibit V.)

Q. (By Mr. Margolis): Now, Dr. Robinson, this morning Mr. Janney testified, I believe, substantially as follows: that in selecting the group out of which the panel, the jury panel, was finally selected, he obtained all of the precinct lists in Los Angeles County, then took each fifth precinct sheet during one year, and each ninth name on each of those precinct lists, and from that made

(Testimony of William S. Robinson.)

up a list of persons to be contacted for prospective jury service, and that in other years he might pick the fourth precinct list and the eighth name, or the sixth name. What do you think of that method as a method of obtaining a cross-section of jurors?

A. It seems to me that there are two questions involved in that. One of them, as a statistician, I have nothing to do with, and that is determining, let's say, the total group from which you are to pick prospective jurors. I suppose that would be the group of persons who are eligible for jury service.

The Court: I think that would come under the heading of what is a cross-section of the community.

Mr. Margolis: I think the Doctor is referring to something else. [334]

Q. You are referring to whether it should be Los Angeles County or should be a broader area?

A. No, I am referring to whether you should include in your group people who cannot become jurors if they are picked. That is, whether you want your sample, let's say, to match the total population, including infants, as to percentages or whether you want it to match some specified sub-population, say, the population 21 years of age or over, or with some other properties in addition.

But it is a well-known fact that among available lists for taking samples from population, the list of registered voters is more representative of, let's say, the total working population or the total labor force than is any other available list, such a city directory or telephone book.

(Testimony of William S. Robinson.)

Q. Would you say that such a list, of the voters' register list, is unrepresentative of other groups in the community, such as professionals, businessmen, and so forth?

A. No, it is most representative of the working population as a whole. It matches it quite closely, much better than did the telephone book.

Q. When you say the working population as a whole, what do you mean?

A. I mean the labor force.

The Court: What about a city directory? That includes [345] everybody, whether they want to vote or don't want to vote. Wouldn't that be apt to be more accurate?

The Witness: You might ask the fishermen if they are in the city directory. I don't think it includes everybody. In fact, I know that it doesn't.

The Court: It is pretty hard to keep your name out of it. I know I kept my name out of it with a great deal of difficulty.

Q. (By Mr. Margolis): There are large sections of the community not even contacted with regard to names, isn't that so?

A. It is upper biased economically, as the Literary Digest found out in 1928.

Mr. Margolis: For example, your Honor, I doubt whether you will find many of any names from the eastside in the city directory, outside of businessmen out there.

Mr. Calverley: I suggest that the voting lists are not accurate, for the reason that I think about

(Testimony of William S. Robinson.)

40 per cent of the people in this county do not register at all.

The Witness: Forty per cent of the people who are eligible, it is true, but it is more accurate than any other source.

Q. (By Mr. Margolis): In other words, you don't say that it is a perfect source?

A. It is not, but it is the best that is available.

Q. I see. So that if some source has to be gone to, you would think that the precinct registration lists would be the best source available, is that right?

A. It is very well established that they are the best source available.

Q. How about the method used with regard to selecting the precinct names, or precinct lists and the names on each precinct list?

A. I cannot possibly improve upon it. It is water-tight, provided that in the method of selection it is rotated so as to cover the entire eligible group over a period of years, as I understand it is.

Q. I see. So that if they took the fifth precinct and the ninth name each year over a period of years, you wouldn't consider that fair?

A. No.

Q. But if that precinct list number and the number of the name on the precinct list was varied from year to year, you would consider that the best possible method?

A. Yes. That is known as a method—let me say in brief—that is recommended as possibly the

(Testimony of William S. Robinson.)

finest method of stratified sampling that exists where you can do it.

Q. Now, Dr. Robinson, you have been retained, have you not, by the defendants in this case in connection with a study of the composition of the grand jurors, trial jurors [347] and prospective grand and trial jurors used in the Federal Courts, is that right? A. That is right.

Q. And in connection with that retainer, have you supervised, acted as a consultant with respect to such study? A. I have.

Mr. Margolis: I think perhaps we should have this document marked for identification so it will be easier to conduct the examination.

It has two parts, Mr. Clerk. I would like to have——

The Court: W-1 and W-2.

(The documents referred to were marked Defendants' Exhibits W-1 and W-2 for identification.)

The Court: Have you seen them?

Mr. Calverley: No. Those are the county registrar of voters' records, I believe.

Mr. Margolis: No, they are not.

(Exhibiting documents to counsel.)

Q. (By Mr. Margolis): I show you a type-written document headed "Summary of Occupations of February 1946 Grand Jurors, According to Classifications Utilized in 1940 Census." On the

(Testimony of William S. Robinson.)

left-hand side of the sheet below the heading appears the following, "A, Professional and Semi-Professional Workers," and below that, "1, Actors, 2, Architects, 3, Artists and Art Teachers," followed by additional classifications of occupations.

Then on the second page there is, "B, Farmers and Farm Managers, C, Proprietors, Managers, and Officials," with sub-headings thereto.

Now, will you tell us, Doctor, where that listing of general classifications and specific classifications was obtained, and what it is?

A. That is the 1940 census modification of the Edwards Social Economic Grouping of Gainful Workers in the United States. It is the official occupational classification of the United States Census Bureau.

The Court: Used in 1940?

The Witness: As used in 1940. It is modified every decade when a census is taken.

The Court: Was that the same one that is used by the authors of this book?

The Witness: That is not.

The Court: "Dictionary of Occupational Tables, Department of Labor, United States of America, 1939"?

The Witness: It is not. And I think you will find on the preface a page in that book a statement that the classification is to be used solely for the United States Employment Office.

(Testimony of William S. Robinson.)

The Court: Solely? [349]

The Witness: Solely, if my recollection is correct.

The Court: It says: "These job definitions have been prepared by the United States Employment Service for the use of public employment offices and related vocational services, and for that use alone."

Would you say by virtue of that that this is not dependable for anybody else?

The Witness: No. That serves a different purpose from the Edwards one, that is all. The purpose of that classification has to do with people who want jobs, in placing people in jobs. The purpose of the Edwards classification is to show the position in the social economic scale.

The Court: Would you say that this Dictionary of Occupational Titles and Definitions is inaccurate?

The Witness: No. I have two copies of it myself.

The Court: You have? You are not connected with the United States Employment Service?

The Witness: No.

The Court: So you do depend upon it for use?

The Witness: Quite.

The Court: I see. All right. Go ahead.

Q. (By Mr. Margolis): However, it is a different type of classification than the one used by the census people, is that right?

A. That is right. [350]

(Testimony of William S. Robinson.)

Q. Because of the different purposes of the two?

A. Yes.

Q. Now, on each of these sheets you find four columns, the first column "Employed as," the second column "Housewives whose husbands are employed as," the third column "Retired whose former employment was," and the fourth column "Total."

Would you explain that?

A. Yes. The figures here are from the questionnaires sent to prospective jurors.

Q. And from other sources as well?

A. And from other sources as well.

The Court: What questionnaires?

The Witness: The questionnaires which have been offered in evidence here.

The Court: By the clerk of the United States Court?

The Witness: Yes.

Mr. Calverley: If the Court please, I am going to object at this time to any further testimony from this witness because there are some of these questionnaires that have not been introduced in evidence and are only marked for identification because they are not complete, and I contend, your Honor, that there is a lack of foundation for this witness' testimony from those records because the venire of the petit jury in 1946 and the grand jury in 1946 which returned this indictment is incomplete, and those two exhibits that have been offered here [351] are partial only and are only marked for identification, and the witness has just testified that he used that

(Testimony of William S. Robinson.)

source. Therefore I contend that there is a lack of foundation for his testimony on that basis.

The Court: Well, I do not know whether there is sufficient foundation for his testimony or not. As I indicated at the commencement of this hearing, there is no standard prescribed for determination, there is no method of procedure, and the real effect of the Thiel case and the Ballard case is that it leaves the matter up in the air. This witness is at best offering his opinion, and I suppose that he proposes to make a table from those that have actually served on the grand jury and the trial jury and then, as an extrapolation of figures, and one thing and another, to reach a conclusion which will be his opinion.

Mr. Calverley: There is a further objection, your Honor, that the witness has not testified that he examined all of the names in the available box which the testimony here by two witnesses called by the defendants, and whom they may not impeach, have testified that that was the source of many of these names; and he has not made any examination of that reserve file at all, which is the source of his opinion.

The Court: I do not think he has testified that he has even examined the cards in evidence, as far as that is concerned. I think you can lay a better foundation with relation [352] to that.

Mr. Margolis: I will withdraw the last question, then, and get back to this. I will get at this in another way.

(Testimony of William S. Robinson.)

Q. Dr. Robinson, did you do all of the work yourself in connection with this study, or was the work done under your general direction and supervision as to methods to be followed?

A. It was done under my direction and supervision as to methods.

Q. Were a number of persons utilized in carrying out those directions and instructions?

A. Yes.

The Court: What did you direct them to do?

Mr. Margolis: That is what I want to get to. Suppose you answer his Honor's question.

The Witness: I directed them to classify the subjects, let's say, by occupational levels.

The Court: What do you mean, the subjects?

The Witness: Classify the persons or questionnaires by occupation.

The Court: What questionnaires?

The Witness: The questionnaires.

The Court: Do you have them? They are all marked as exhibits here.

Mr. Margolis: There are exhibits relating to each of these [353] groups of questionnaires.

The Court: Let's pile them up so he can have them available.

Q. (By Mr. Margolis): So that the record will be entirely clear, Doctor, you yourself did not obtain information from the questionnaires; you merely gave instructions as to that point, is that right? A. That is right.

(Testimony of William S. Robinson.)

The Court: He said he got them from the questionnaires. These are the only questionnaires that are here. I don't know what questionnaires he is talking about.

The Witness: I instructed other persons to get the information from the questionnaires.

The Court: What questionnaires? There are many groups of questionnaires there, Doctor.

The Witness: There are many tables here also.

The Court: What is that?

The Witness: There are many tables here also.

The Court: Many tables?

The Witness: That is right.

The Court: But we are not to the tables yet. We will get to those in a few moments. Now we are talking about the questionnaires. There may be groups of them there. Which questionnaires did you direct your people to examine?

Mr. Margolis: Perhaps I can help the Doctor in his [354] recollection by placing the tables in front of him.

The Court: I think we might have a morning recess.

(Short recess.)

Mr. Margolis: Shall we proceed, your Honor?

The Court: Usual stipulation?

Mr. Margolis: Yes, your Honor.

Mr. Calverley: So stipulated.

Q. (By Mr. Margolis): Either from your own notes, which I see you have there, or from checking

(Testimony of William S. Robinson.)

these documents which have been prepared, will you tell us, Doctor, what questionnaires you directed the people to refer to in connection with this study?

A. Well, here is one in my list, the grand jury February 1947. I instructed them to take all the questionnaires for the members of that grand jury and to tabulate their occupations.

Q. What others?

A. In September 1946 grand jury, the February 1946 grand jurors.

Q. I think, Doctor, for the sake of the record, if I may make a suggestion—I think your notes and these exhibits are the same, but these are in chronological order—would you please refer to them?

A. February 1946 grand jurors. The persons on the grand jury panel February 1946. [355]

The Court: Questionnaires for those?

The Witness: That is right. September 1946 grand jury.

The September 1946 grand jury panel.

The September 1946 petit jury.

All 1946 jurors for whom information is available.

Persons on the grand jury February 1947.

Grand jurors February 1947 excused.

Persons on the petit jury 1947.

Mr. Margolis: February?

The Witness: February 3rd.

Questionnaires for petit jurors summoned to appear February 17, 1947.

Petit jurors 1947 excused.

Persons on the jury not drawn 1947.

(Testimony of William S. Robinson.)

And the overall summary of the jury 1947.

The Court: That would be all the persons in what we have referred to as the master box, would it not, Mr. Margolis?

Mr. Margolis: That is correct. It would be the total of all these other exhibits.

Q. All right, now. Were you informed, Dr. Robinson, that some of these questionnaires did not obtain information concerning occupations and on others the information was not clear?

A. That is correct.

Q. What instructions did you give with regard to obtaining [356] information concerning occupation of jurors or prospective jurors where either the occupation was not given on the questionnaire or where it was not clearly stated on the questionnaire?

A. Substantially, those instructions given to enumerators in the 1940 census. In particular, that where the occupation was not given or was not clear, other sources should be used to get the occupation, and those sources—and this is not the census enumerators' instructions—those were to be the city director, which in social research is established as a reliable source, next the register of voters, and finally, if necessary, if either of those gave the occupation, a personal phone call to the person.

Q. Is that considered a reliable method of obtaining information from a scientific standpoint, the latter?

A. Yes.

Q. Then when information was obtained as to those occupations, did you give any instructions

(Testimony of William S. Robinson.)

with regard to correlation of the information received with the classifications used in the census and, if so, what instructions?

A. I gave the detailed classification list which is provided for the 1940 census.

Q. That was obtained out of the 1940 census, is that right? A. That is correct. [357]

Mr. Margolis: If your Honor is interested in examining this, or counsel is interested in examining this—I don't want to offer this in evidence because it is the only copy I have.

The Court: Let counsel look at it.

Mr. Margolis: I am showing counsel a copy of "Population, Third Series, Labor Force, Occupation, Industry, Employment and Income, California."

If your Honor would be interested in seeing this, the occupation tables are shown here.

(The document referred to was passed to the Court.)

Mr. Margolis: I just happened to turn to one at random, your Honor.

The Court: This is just one occupation table, class of worker and age of employee, persons except on public emergency works, by industry and section for cities of 250,000 or more. This is a very small classification, is it not?

The Witness: A very detailed classification; yes.

The Court: How many different kinds of workers do they have classified?

The Witness: I don't know.

(Testimony of William S. Robinson.)

The Court: Do they classify them by jobs or just by industry?

The Witness: They classify them by jobs and type of jobs, and there may be industrial classifications as well. [358] But that is not the basis.

The Court: This table that he turned to is Los Angeles, total, and so forth, manufacturing. Now, there is bakery products, beverage industry, petroleum products, and so forth. These are only by industries and not by jobs.

The Witness: I think you will find further classification later on. I can show it to you, if you would like to see it, by jobs. That is the basis of the census classifications first and fundamentally, by job and, secondly, a break-down by industries.

Mr. Margolis: I think if you will look at the heading there, you will find that the main heading under manufacturing is operatives, or operatives and kindred workers. In other words, within the type of work there are also break-downs as to industry.

The Court: This says agriculture, forestry and fisheries. Agriculture, forestry except logging, and fisheries. Then it says mining, gold mining, crude petroleum, and so forth. Then it says manufacturing, transport, wholesale and retail trade, finance. This is by type of business, I think. It certainly isn't by type of job.

Mr. Margolis: May I have that for a moment, your Honor? I would like to point something out.

(The document referred to was passed to counsel.)

(Testimony of William S. Robinson.)

Mr. Margolis: This is not the table we used, your Honor. [359] Excuse me. I really did turn to a page at random.

Here is the table that was used.

Your Honor will notice the main break-downs and the subdivisions under those break-downs.

The Court: Professional and semi-professional workers, farmers and farm managers, proprietors, managers and officials, except farm, clerical, sales and kindred workers, and so forth. There seem to be 93 types of occupations.

Mr. Margolis: I haven't counted them.

The Court: They are tabled here. That "93" may be line 93.

Mr. Margolis: There are two pages. It is continued on the opposite page, not turning the page but the opposite page.

The Court: No, this is different.

Mr. Margolis: Then on that one you turn the page.

The Court: I see.

Mr. Margolis: I am sure it is more than 93, your Honor.

The Court: Yes. That is the line number, I see. There are about 181 occupations listed.

Proceed.

Q. (By Mr. Margolis): I want to go back to the question as to your instructions with regard to correlation of the information received concerning occupation with this occupational table or index or method of classification used by the Census Bureau.

(Testimony of William S. Robinson.)

A. By "correlation," do you mean my instructions as to which class to put the different persons in?

Q. That is right.

A. My instructions were to follow the detailed listings that were given here as to individual occupations, to classify them in as detailed a fashion as possible, and they were later then grouped into broad classes.

Q. The same broad classes used by the United States Census Bureau?

A. Yes, and the same detailed classes as used by the United States Census.

The Court: How many detailed classes does the United States Census use?

Mr. Margolis: We can count it, your Honor.

The Court: Does the Doctor know?

The Witness: I think your 181 is right.

The Court: I was looking again at the heading, and it is just for male. That doesn't show over in the female. I don't know whether they change that over here for female or not.

Mr. Margolis: I believe you will find that they are the same except, for example, instead of having actor, you have actress.

The Court: I do not see any female firemen.

The Witness: Provision is made for duplicate entries for [361] male and female, but where no females are shown the class is simply left out, unless it is tabulated in two columns for comparison.

(Testimony of William S. Robinson.)

The Court: The difficulty here, counsel, is that there appear to be different pages cut out.

Mr. Margolis: We were using those pages.

The Court: Pages 94 to 99 are cut out in this book.

Mr. Margolis: Here they are, 87 to 89.

The Court: No, those are not the pages.

Mr. Margolis: There are numerous tables giving the same thing for various cities.

The Court: This is Los Angeles that I am looking at. I am just confining my remarks now to Los Angeles which begins, as to males, on page 90, and as to females on page 94.

The Witness: Los Angeles County or City?

Mr. Margolis: Los Angeles City.

The Court: It just says Los Angeles. I suppose it is city, I don't know.

Mr. Margolis: That is city, your Honor. We used the Los Angeles County figures but we had to borrow that from the Public Library and return it. We do not have that here. But it is available in the Los Angeles Public Library.

The Court: May I see your other pages?

Mr. Margolis: Those that were taken out I notice were used merely for copies of the classifications. We cut out [362] Oakland because we didn't need it.

The Court: Those are pages 55, 56, 57 and 58, and it is pages 95, 96, 97 and 98 that are missing.

Mr. Margolis: I don't know where they are, but so far as the actual population figures are concerned,

(Testimony of William S. Robinson.)

we used Los Angeles County, for which we do not have the book here. We merely wanted to show, your Honor, the form, the type of thing to which we are referring. The Los Angeles County book is set up in the same way, is it not, Doctor?

The Witness: That is right.

The Court: Let's go back to that question. How many occupations, male and female, does the census figure use?

The Witness: I don't know. I never counted them. I would think it would be, to a statistician that question wouldn't occur.

The Court: The reason I am asking the question, Doctor, is because you said you instructed your helpers to break them down according to the census classification in detail.

The Witness: Let me put it this way: Detailed titles, let's say the titles for specific occupations, were used as a guide in placing persons of given occupations in broader categories by which we have them classified here. The list of detailed occupations is, so to speak, an enumerated definition of what is a professional worker or what is an operator, that is all. [363]

The Court: Well, then, how many, would you say, master classifications or broad classifications or key classifications did you have?

The Witness: I can find that from one of the summary tables.

The Court: Is it the same number used here? They use, I think, in this book 14.

(Testimony of William S. Robinson.)

The Witness: The census uses 1, which is professional——

The Court: They have here professional and managerial, and they have three classifications in that, clerical and sales, two classifications in that, service, four, agriculture, three, then skilled, semi-skilled and unskilled.

The Witness: We have 10. They are professional, semi-professional, which is a grouping of two of the census major classifications, farmers and farm managers, that is two, three, proprietors, managers and officials, excluding farm, four, clerical, sales and kindred workers, five, craftsmen, foremen and kindred workers, six, operatives and kindred workers, seven, domestic workers, eight, service workers except domestic, nine, farm laborers—I am sorry—nine is laborers all together, ten, no information.

The Court: What about non-manufacturing, such as railroads, transportation, communication, utilities, wholesale and retail, personal service, other non-manufacturing industries? [364]

The Witness: This is not an industrial classification. This is a function or type of operation performed classification.

Q. (By Mr. Margolis): Suppose you tell us what each of these groups include generally.

A. Well, professional and semi-professional workers I think is fairly plain, but let's get a detailed statement.

(Testimony of William S. Robinson.)

Here we have actors, architects, artists and art teachers, authors, editors and reporters, chemists, assayers, metallurgists, college presidents, professors and instructors, clergymen——

Q. Without going into all of them, is that typical of the kind of person included?

A. That is typical. Lawyers and judges are included there also.

Pharmacists, physicians and surgeons, social and welfare workers.

The Court: Yes, I see them.

The Witness: Farmers and farm managers, I think, is plain on its face.

Proprietors, managers and officials is just what it purports to be.

Q. (By Mr. Margolis): Perhaps the term managers and officials is not entirely clear. What is a proprietor, one who owns his own business?

A. That is right.

Q. Or who has an interest in the business?

A. That is right.

Managers, I think, is plain also—well, a production manager, the manager of a firm or of an office, an office manager, anyone in a managerial or in, let us say, a position of authority, controlling a large number of other employees.

Q. All right. What is meant by officials?

A. Officials are representatives of, let us say, corporations.

The Court: Is that the definition the census uses?

(Testimony of William S. Robinson.)

The Witness: I am giving it to you more or less ad lib, but that is what it means. Conductors, postmasters, they are officials.

The Court: Is that what it means, according to your concept, or is that the prescribed definition or instruction of the Census Department when they are classifying people?

The Witness: That is the instruction of the Census Department, but not in the Census Department's words.

The Court: Do you have the information from the Census Department?

The Witness: The Census Department may give a general statement in the introduction to the volumes. The Census Department's real definition, however, is as I have said before, an enumerative one. It lists occupations which belong [366] under proprietors, managers and officials, and if you want to read the list, I can do that for you.

The Court: No, they are here in this book.

The Witness: Yes, that is right. Railroad conductors, postmasters——

The Court: He wouldn't be a proprietor; he would be an official of some kind.

The Witness: This includes proprietors and officials.

The Court: You mean a conductor is an official of a railroad?

The Witness: Yes, he is an officer representing the railroad.

(Testimony of William S. Robinson.)

Mr. Margolis: In charge of a train, your Honor.

The Witness: That is not my definition; it is the census'.

The Court: Baggage-man, that is a clerical service.

The Witness: Yes.

The Court: All right.

Q. (By Mr. Margolis): Will you go on?

A. The next is clerical, sales and kindred workers, and there you have baggage-men, bookkeepers, messengers, mail-carriers. In the main, by and large, it is clerks, sales people, canvassors and solicitors. The definition again is an enumerative one, but this is a more consistent category.

Q. Would it be correct to say that that were a classification of non-administrative, non-professional, non-executive [367] white-collar workers?

A. That is right.

Then we have craftsmen, foremen and kindred workers, and that is, I think, pretty much self-explanatory.

Q. Give a few examples.

A. Bakers, blacksmiths, boilermakers, machinists, locomotive firemen, welders, painters——

Q. I think that is enough.

How about operatives and kindred workers?

A. Operatives are people who run machines and apprentices, attendants, filling station, parking lot and airport, brakemen and switchmen, chauffeurs, truck drivers, firemen.

The Court: Motormen?

The Witness: I think so.

(Testimony of William S. Robinson.)

The Court: That is what it says here.

The Witness: Dressmakers and seamstresses, welders and flame-cutters.

The Court: Sailors and deckhands.

The Witness: That is right. Essentially, they are people who operate machines or equipment of some sort.

The Court: Where is a fisherman found here?

Mr. Margolis: Before we go on to that——

The Court: Well, all right.

The Witness: At the moment I haven't the slightest idea, but I think we can find out. [368]

Mr. Margolis: I think I told your Honor during the argument on the motion to dismiss that the fishermen were a hybrid creature. You would probably have to look several places for him.

The Witness: As I say, this is a census classification and had you ever read discussions of classificatory problems in the census you would have discovered that their main purpose is not so much a functional classification, that is, by very small classes, as the necessity of getting unambiguous definitions of occupations. The large and broader classes follow a social economic scale, the minor ones don't, and there is a good deal of arbitrariness about it which is necessary for the sake of clarity. I will now look for fishermen.

Fishermen and oystermen are laborers except farm and mine.

The Court: Of which there are 1923 in Los Angeles.

The Witness: Yes.

(Testimony of William S. Robinson.)

Mr. Calverley: In that connection, if I may interrupt a moment, it is the contention of the government here, by this indictment returned by the grand jury under oath, under paragraph 11, that the first defendants here are not employees, workers or laborers who receive a salary or wage for their work or labor, but are independent businessmen engaged in business on their own account and who operate fishing boats on their own account and for their own profit.

Mr. Margolis: I assume we are not bound in advance by a finding that that is so.

Mr. Calverley: There has been no proof here that they are anything other than what has been charged, and the petition is unverified in this motion here.

The Court: The only purpose of this inquiry is to determine whether or not it is a cross-section. I see here that they have real estate agents and brokers, and classified under salary received. Now, I suppose that took everybody whether they owned their own real estate office or whether they did not, I don't know.

Mr. Margolis: There are two types. One group would fall under proprietors, and the other under those employed as real estate brokers and agents. You will find real estate under two headings, your Honor. If your Honor will look under the proprietors, managers and officials, you will find finance, insurance and real estate as a heading; and if your Honor will look under clerical, sales

(Testimony of William S. Robinson.)

and kindred workers, your Honor will find real estate agents and brokers.

The Court: They have finance, insurance and real estate, 3194 in Los Angeles County. They must have missed some when they took that census if they were counting all the real estate men in 1939.

Mr. Margolis: Those are the proprietors, your Honor.

The Court: Yes, and there are 4,000 real estate agents. [370] All right. Go ahead.

Q. (By Mr. Margolis): I think, Doctor, you were starting to tell us about operatives.

A. Yes.

Q. You told us partly. Let me ask you this question about operatives: Are the industrial workers, the workers in the mass industries, like steel, rubber, auto, and so forth, included within operatives?

A. Yes, and they are very heavily represented.

The Court: Counsel, instead of just having the witness testify from all that, in so far as he took the census records, why don't we get some of these books some place or photostat these pages, showing the occupation, area occupation for Los Angeles. There are two pages for male and, I think, two pages for female. All the classifications will be in the record then.

That is what you used, isn't it?

The Witness: Yes.

(Testimony of William S. Robinson.)

Mr. Margolis: We will be glad to have photostatic copies made.

The Court: There are pages missing here. I don't know what they show.

Mr. Margolis: We can get photostatic copies made of the Los Angeles County book, which are the figures we actually used. [371]

The Court: If those are the ones you actually used, I think both male and female should be made up, however.

Mr. Margolis: The classifications are the same in Los Angeles City; the figures as to number and population are different.

The Court: Let's get the pages photostated and put them in here, and that will give them an exhibit number, and they will belong to you, then.

Mr. Margolis: Very well. We will get that. We will have to borrow that from the Los Angeles Library. It is apparently not available anywhere else, so far as we have been able to find out.

The Court: I was looking for it, too, and wasn't able to find it any place.

Q. (By Mr. Margolis): Among the jurors or prospective jurors, there were some who were found to be housewives or retired, is that not true?

A. That is right.

Q. What instructions did you give with regard to them?

A. First, that housewives as a class and retired as a class, were to be tabulated and treated sepa-

(Testimony of William S. Robinson.)

rately, to begin with, so that we should have records for those questionnaires representing employed people for those questionnaires representing housewives separately, and for those representing retired persons separately. [372]

The reason for doing that was—I will put it more easily in another way—the general purpose of this classification is to put into different classes people with different, let us say, economic and social attitudes and backgrounds. It is a well-known fact in sociology, if you like, that one's class in the Edwards Classification is indicative of one's social attitudes.

The Court: What is this Edwards Classification?

The Witness: The occupational classification we used.

The Court: Used by the census?

The Witness: That is right. It was originally invented by a member of the Census Bureau called Edwards, often referred to as the Edwards Classification.

Now, when you come to people who have no occupation or, let's say, can't be placed in this list, such as housewives, some questions might arise so we wanted to treat them separately.

What I instructed should be done, if we wanted to combine housewives with employed, was to classify a housewife as of the occupation of her husband. Now, there is a reason for that. It could be very easily established that there is a high correlation between the social and economic attitudes of hus-

(Testimony of William S. Robinson.)

bands and wives. You find, for example, the very large percentage of families in which husbands and wives vote the same ticket, Republican and Democrat alike, and relatively many fewer households in which husbands and wives vote opposite. There is a general tendency for their attitudes to be the same.

Therefore the best we could do—and it is a perfectly good method, as research goes—if we wanted to have the housewives in, was to classify her according to the occupations of their husbands as giving the best indication of their position in this scale of social economic status or attitudes.

The same thing effectively was done for the retired persons.

The Court: Do you make any effort to ascertain whether or not they had worked in some occupation before they got married?

The Witness: No.

The Court: Well, under the Edwards scale or table, or in sociology, do you take that into consideration in determining what a person's viewpoint might be if there is such a thing as an economic class?

The Witness: For individual people that would not be particularly representative of their attitudes, of a woman's attitude.

The Court: In other words, if a woman had been a school teacher for 25 years and got married, and was married for two years, you don't think that would affect her attitude?